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(*continued*)

CYRIL GRUNFELD

Antitrust Law in Britain Since the Act of 1956

THE EXPERIMENT BEGUN IN BRITAIN in 1948[1] of general regulation of monopoly and restrictive trade practices and agreements underwent an important development last year with the enactment of the Restrictive Trade Practices Act, 1956.[2] After eight years of industry by industry investigation by the Monopolies Commission culminating in a general report on collective discrimination,[3] machinery for the systematic regulation of restrictive trade practices and agreements has been established, which it is the chief purpose of the present paper to describe. In addition, reference will be made to the modified but extremely important role of the Monopolies Commission, the work of which forms an integral part of the new structure of governmental control.

I. BACKGROUND

Until 1948, general regulation of monopoly and restrictive trade agreements and practices in Britain lay in the hands of the ordinary

Cyril Grunfeld is Reader in Law in the University of London (London School of Economics and Political Science).

[1] The Monopolies and Restrictive Practices (Inquiry and Control) Act, 1948, amended by the Monopolies and Restrictive Practices Commission Act, 1953. I am deeply indebted to Mr. B. S. Yamey for his critical reading of my paper in draft, errors that may have remained being my sole responsibility.

[2] The Act has already stimulated a substantial literature which includes Wilberforce, Campbell, and Elles, Law of Restrictive Trade Practices and Monopolies (1957); Albery and Fletcher-Cooke, Monopolies and Restrictive Trade Practices (1956); Heathcoat-Williams, Roberts, and Bernstein, Law of Restrictive Trade Practices and Monopolies (1956); Johnson-Davies and Harington, Restrictive Trade Practices (1957); Martin, Restrictive Trade Practices and Monopolies (1957); Bagnall and Wall, A Guide to Restrictive Trade Practices (1957). Reference may also be made to Prof. C. Kaysen's "Restrictive Practices Bill: An American View" in the June, 1956, issue of the London and Cambridge Economic Bulletin, and to the article by B. S. Yamey and the author in the Winter, 1956, issue of Public Law. For permission to reproduce sections of this article I am deeply indebted to the Editor of Public Law.

[3] Collective Discrimination—A Report on Exclusive Dealing, Collective Boycotts, Aggravated Rebates and other Discriminating Trade Practices, 1955, Cmd. 9504: discussed by Yamey in 19 Mod. L. R. (1955) pp. 63–75. Although the general report did not conclude the Commission's investigations of restrictive trading agreements in the home market, it was undoubtedly the culminating point of those investigations.

courts of law, which is to say that there was no general regulation.[4] Single firm monopoly, achieved through procedures freely permitted under companies legislation, was never made the subject of judicial intervention. Nor did the courts move against informal arrangements and agreements that were not intended to be legally binding. Their jurisdiction covered only firm contracts in restraint of trade. In determining the validity of such contracts they applied, as is well-known, the rule of reason. But, in applying that rule to contracts or contractual trade associations that restrained competition on a significant scale, the British courts, unaffected by the spur of legislation like the Sherman Act, adopted an attitude of *laissez-faire*. They upheld the validity of virtually every contract or association that came before them involving restraint of competition through resale price maintenance, division of markets, exclusive dealing, collusive tendering, tie-in clauses, restrictive quotas, and other common restrictive practices. In addressing themselves to the public policy involved in contracts in restraint of trade, the courts conferred in effect the fiat of the common law upon industrial trusts and combines and trade associations and, generally, upon the more important forms of contractual arrangement tending to reduce competition.

Similarly, when dealing with the problem of the use of economic pressure against trade association members or against outsiders not members of the association to force them to conform with restrictive trade policies, the courts displayed an attitude of acquiescence. In particular, they largely neutralised the tort of conspiracy in its general form by holding that pursuit of commercial self-interest is a complete defence where no unlawful acts have been committed: the well-known rule in *Mogul S.S. Co. v. McGregor*.[5]

This self-abnegation resulting in an absence of any effective regulation of monopolistic practices and agreements had at least the merit of compelling later a more thorough and rational approach to the solution of one of the fundamental problems of contemporary society, how to foster and preserve the beneficial and dynamic side of commercial power.

Of course, the absence of a general regulatory case law does not mean that there has been an absence of statutory provisions directed towards specific industries and specific commercial activities. There is the legislation that has created and controls the various national monopolies in the provision of rail transport services,[6] and in the production and dis-

[4] The common law of restraint of trade and conspiracy with special reference to monopoly and restrictive trading agreements is analyzed by the author in Antitrust Laws (1956, ed. W. Friedmann) pp. 341–61.

[5] [1892] A.C. 25.

[6] Transport Acts, 1947 and 1953.

tribution of coal,[7] gas,[8] electricity,[9] atomic energy and radioactive substances;[10] there is the Iron and Steel Board that exercises a general supervision over its industries:[11] there are the statutory licensing authorities whose function is to maintain a state of "ordered competition" among road passenger transport[12] and road haulage operators,[13] as well as the Air Transport Advisory Council which determines how far private airline operators shall participate with the public air corporations in scheduled journey traffic.[14] There is the Independent Television Authority to lay down and enforce the rules of the game for commercial television services.[15] There are the statutory monopolies in the marketing of certain agricultural products[16] and in the supply of postal,[17] telecommunications[18] and sound broadcasting services.[19] There is the Patents Act, 1949, with its provisions to safeguard against the abuse of patent monopoly power; and there are the odd prohibitions of blind booking and advance booking agreements in the cinematograph trade[20] and of collusion among professional buyers at the auctioning of goods.[21] In addition, there are the laws, like import restriction laws, concerned with the control of foreign competition.[22] Also, a fairly well developed law exists designed to curb unfair trading practices,[23] but these are outside the mainstream of monopoly and restrictive trade practices. All the above specialised statutes have been left untouched by the new general legislation of 1948–56.

In describing the new legislation as it operates at present, it is necessary to draw a primary distinction between agreements or arrangements between two or more persons or legal entities that restrict competition,[24] on the one hand, and, on the other hand, corporate or single firm monop-

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[7] Coal Industry Nationalization Act, 1946.

[8] Gas Act, 1948.

[9] Electricity Act, 1947.

[10] Atomic Energy Act, 1946; Atomic Energy Authority Act, 1954.

[11] Iron and Steel Act, 1953.

[12] Road and Rail Traffic Act, 1933, amended by Transport Act, 1953.

[13] Road Traffic Act, 1930, amended by Transport Act, 1953.

[14] Civil Aviation Act, 1949; Air Corporations Act, 1949.

[15] Television Act, 1954.

[16] Agricultural Marketing Acts, 1931–49.

[17] Post Office Act, 1908.

[18] Cable and Wireless Act, 1946; Telephone Transfer Act, 1911.

[19] The British Broadcasting Corporation enjoys its monopoly under a renewable charter.

[20] Cinematograph Films Act, 1938.

[21] Auctions (Bidding Agreements) Act, 1927; but, see Yamey, "Bidding Agreements at Auctions," Butterworths S. African Law Review, 1955 pp. 73–80.

[22] Like the Dyestuffs (Import Regulation) Acts, 1920–34.

[23] E. G., Merchandise Marks Acts, 1887–1953; Trade Marks Act, 1938; Registered Designs Act, 1949; law of torts relating to passing-off and slander of goods and title.

[24] Partnerships, however, are expressly excluded: 1956 Act, ss. 6(8), 26(2).

oly, whether it be reposed in a single company or in a single enterprise unit consisting of holding and subsidiary companies with interlocking directorates. A secondary distinction also has to be made which is attributed to Britain's dependence on its overseas trading position, namely, between monopoly and restrictive trade agreements or arrangements in the home market, on the one hand, and, in the export market, on the other. Broadly speaking and leaving certain complications aside, it will be seen that agreements between two or more in restraint of trade in the home market now fall principally within the sphere of control of the newly created Registrar and Registry of Restrictive Trading Agreements and Restrictive Practices Court; while such agreements in the export market together with single firm monopoly in both the export and home markets are subject to possible investigation by the Monopolies Commission on the motion of the Board of Trade, which may result in voluntary or compulsory abandonment of the restrictive or discriminatory practices concerned.

The work of the Registry, the new Court, the Commission, and the Board of Trade is subject to one over-all limitation. The new regulative regime covers only the supply, acquisition,[25] and processing of goods and the provision of building services.[26] It does not apply to the provision of any other kind of services, whether those of banks, insurance companies, building societies, shipping companies, advertising or travel agencies, mercantile agents, hairdressers, the entertainments world, or any other kind.[27] Nor does it apply to collective labor relations or the terms and conditions of individual contracts of employment. The whole area of labor relations, collective and individual, has been kept outside the scope of the monopoly and restrictive trade practices legislation.[28] The official reason why commercial services generally were omitted was mainly because it was felt that goods were enough to go on with.[29] Possibly, commercial services will be brought in at a later stage. As to labor relations, their voluntary character in Britain, the adherence of government and both sides of industry to the principle of industrial autonomy put the possibility of applying the new legislation even to restrictive labor practices outside the bounds of effective discussion.

[25] Includes supply and acquisition by way of lease or hire (including hire-purchase): 1948 Act, s. 20(1); 1956 Act, s. 36(1).

[26] 1948 Act, s. 20(1); 1956 Act, s. 36(1)(2).

[27] Unless the services are bound up with the supply, acquisition, or processing of goods.

[28] 1948 Act, ss. 3(2), proviso, 4(2), 5(4); 1956 Act, s. 7(4). Employers' associations for collective bargaining and handling other labor questions are of course, excluded, having nothing to do with the supply, acquisition, or processing of goods.

[29] House of Commons Debate, 6 March, 1956, Vol. 549, col. 1942.

II. Restrictive Trading Agreements in the Home Market

Among trading restrictions in the home market that are the subject of agreements or arrangements between two or more persons or companies, resale price maintenance has been placed by the 1956 Act in a class by itself.

Resale Price Maintenance. The *collective* enforcement of resale prices has been made illegal *per se*.[30] The members of a trade association or less formal trade combination who want to deal with a price cutter may no longer achieve their desire outside the courts through the use of their collective economic power. Arraignment before a private trade tribunal, fining, stop-listing, discriminating against the offender in subsequent dealings, all these are rendered unlawful when their purpose is the enforcement of resale prices. But "unlawful" does not mean "criminal."[31] One of the most noteworthy features of the 1948–56 legislation is the absence of nominally criminal sanctions to support the prohibition of any restrictive trade agreement or practice. In the case of collective enforcement of resale prices, the person or company harmed has two forms of redress. He may move the Crown to bring civil proceedings in the High Court for an injunction or other appropriate relief,[32] and, in addition, he may himself bring an action for compensatory damages if he has sustained loss as a result of the now unlawful acts of the combiners.[33] This—a combination inflicting damage through the commission of unlawful acts—is, of course, the narrower form of the tort of conspiracy, in respect of which the defence of pursuit of trade interests is not available.

Nevertheless, manufacturers and other suppliers have not been rendered impotent to enforce their resale price conditions. *Individual* resale price maintenance has been expressly legalized.[34] Furthermore, the obstacle put in the path of the dominant supplier by *Dunlop v. Selfridge*[35] has been removed. It has been provided, by way of exception to the doctrine of privity of contract, that an action for an injunction and damages may be brought by a main supplier against a middleman once or

[30] 1956 Act, s. 24. Conditions of price at which goods may be resold include discounts and part exchange allowances: s. 26(1).

[31] 1956 Act, s. 24(6).

[32] s. 24(7).

[33] s. 24(8). If the combiners form a trade association, the association itself may now be sued in tort, despite the fact that a trade association is a "trade union" within the meaning of the Trade Union Acts, 1871–1913 and the Trade Disputes Act, 1906, s. 4: 1956 Act, s. 24(8). This is only the second example in English law of a differentiation being made between labor unions and trade associations. The first was in the 1948 Act, s. 11(4).

[34] 1956 Act, s. 25. Hire-purchase is included: s. 26(3).

[35] [1915] A.C. 847.

further removed, provided that middleman can be shown to have had actual notice of the resale price conditions.[36] Thus, in the case of the chain of distribution, manufacturer–wholesaler–retailer, manufacturer has a right of action not only against the wholesaler but also against the retailer with notice: it must be actual, not merely constructive notice, but notice of the conditions need not accompany each article sold; timely receipt of the current price list will do.[37] Some large manufacturers, like the Austin Motor Co., Dunlop Rubber Co., and Imperial Tobacco Co.[38] have already taken advantage of the new law.

Restrictions On Competition Other Than Resale Price Maintenance. The 1956 Act provides for the compulsory registration of a very wide range of agreements or arrangements which impose trading restrictions other than resale price maintenance. Whether the agreements or arrangements are legally enforceable or not is immaterial[39] and, for the sake of convenience, I shall hereafter refer to them simply as "agreements." The Registry of Restrictive Trading Agreements is the new governmental agency that has been entrusted with the task of compiling the register. In charge of the Registry is the Registrar of Restrictive Trading Agreements[40] who is responsible for building up and running the Registry, appointing its staff and establishing their conditions of service (within limits set by the Treasury) and laying down regulations for the proper maintenance of the register and its availability for public inspection.[41] His is the statutory duty to compile a register of restrictive trading agreements as defined by the Act.[42]

The other principal duty of the Registrar is to take proceedings before the newly created Restrictive Practices Court to determine the legal validity of *all* agreements on the register.[43] It should be stressed that the question of registration is entirely separate from and independent of adjudication of the validity of any agreement.[44] All agreements containing trade restrictions as stipulated by the statute must be registered even

[36] s. 25(4).

[37] County Laboratories, Ltd. v. J. Mindel Ltd. [1957] 2 W.L.R. 541.

[38] The Tobacco Association, which existed chiefly for collective resale price enforcement, was wound up. Its members, like Imperial Tobacco Co., have now switched to individual resale price maintenance.

[39] s. 6(3).

[40] The Registrar is a senior civil servant transferred from the Treasury Solicitor's department.

[41] ss. 1(2)(4), 11 19.

[42] s. 11(2).

[43] s. 1(2).

[44] Save so far, of course, as registration is a pre-condition of proceedings on the question of validity.

though it is as clear as daylight that the agreement in question will readily be validated by the Court. Within the limits set by the Act, the aim is to establish a comprehensive and continuous surveillance and control of agreements in restraint of competition. And this surveillance and control is vested in a single central machinery composed of the Registrar and the Court. Within the limits of the Act, this is, in my opinion, at least on paper, an improvement on the American antitrust machinery which appears to be split up among agencies with overlapping functions and to operate in a selective and sporadic way. It is an improvement which has, of course, been to a substantial extent built upon the American Federal experience.

Registration

Which agreements, then, must be registered under the 1956 Act? The answer is, agreements between persons or companies carrying on business within the United Kingdom under which two or more of the parties accept "restrictions",[45] not necessarily identical, in respect of any one or more of the following matters, namely:

(1) the *prices* to be charged, quoted, or paid for goods supplied, offered or acquired, or for the application of any process of manufacture to goods;
(2) the [other] *terms or conditions* on or subject to which goods are to be supplied or acquired or any such process is to be applied to goods;
(3) the *quantities of goods* to be produced, supplied, or acquired;
(4) the *description of goods* to be produced, supplied, or acquired;
(5) the *processes of manufacture* to be applied to any goods, or the quantities or descriptions of goods to which any such process is to be applied;
(6) the *persons or classes of persons* to, for, or from whom goods are to be supplied or acquired, or any such process applied;
(7) the *areas or places* in or from which goods are to be supplied or acquired, or any such process applied.[46]

There are also ancillary provisions to ensure the inclusion of aggretated rebates,[47] quota and pooling agrements however drafted,[48] and the not uncommon case of the trade association which does not impose any

[45] s. 6(3): "includes any negative obligation whether express or implied and whether absolute or not."
[46] s. 6(1).
[47] s. 6(4).
[48] s. 6(5).

of the statutory restrictions on its members by its constitution but makes "specific recommendations (whether express or implied)"[49] to its members involving the adoption by them of restrictive practices of the kind emunerated in s. 6(1).

I have already mentioned how the new legislation leaves intact the older statutory law of monopoly and competition.[50] In addition, there are certain other restrictions and restrictive agreements which the Act expressly provides need not be registered. Restrictions involving compliance with standards approved by the British Standards Institution fall, for self-evident reasons, into the category of "restrictions to be disregarded."[51] So, also, in order to encourage the circulation of technical knowledge, do agreements for the exchange of technical information imposing necessary restrictions for the protection of the manufacturer divulging that information.[52] Finally, the restrictive terms described in sections 7(2) and 8(3) are required to be treated in an exceptional way.

Under s. 7(2), in determining whether an agreement for the sale or other supply of goods should be registered, no account must be taken of any statutory restriction relating "exclusively" to "the goods supplied . . . in pursuance of the agreement." This provision applies equally to bilateral and multilateral agreements, and refers, for example, clearly to quota or price maintenance or quality terms about the goods supplied. If an agreement contains s. 7(2) terms only, it plainly will not be registrable; while, if an agreement contains s. 7(2) terms plus other statutory restrictions, the s. 7(2) terms must be cancelled out in one's mind, as it were, and only the remainder of the agreement examined to decide whether it should be registered.

Exempted agreements under s. 8(3) are agreements for the sale or other supply of goods, between two and no more than two parties, who accept restrictions only in respect, broadly, of exclusive dealing: that is, where the supplier grants an exclusive distributorship or agrees to restrict the number of his distributors, while the distributor–buyer agrees to refrain from dealing in "goods of the same description" of other suppliers or to limit himself in some way in dealing in such goods. If a bilateral agreement for the supply of goods contains *only* s. 8(3) terms, it is exempt from registration; if s. 8(3) plus s. 7 (2) terms, then, it is arguable on the wording of the Act whether there is exemption under s. 8(3), though the Registrar has taken the view that such agreement is exempt

[49] s. 6(7). The scope of an implied specific recommendation remains to be explored.
[50] ss. 7 and 8, generally.
[51] s. 7(3).
[52] s. 8(5).

on the ground that, since no account shall be taken of s. 7(2) terms, such agreement should properly be treated as if it contained s. 8(3) terms alone.[53] But, if a bilateral agreement for the supply of goods contains s. 8(3) plus s. 7(2) plus other statutory restrictive terms, then, although the s. 7(2) terms may have to be discounted, s. 8(3) no longer applies and exclusive dealing as well as the other restrictive terms must be taken into account in deciding whether the agreement is registrable.

I have stated these technicalities at what may seem excessive length in a paper of this kind because sections 7(2) and 8(3) became the leading issues in the first case to come before the High Court on registrability, the case of *In re Austin Motor-Car Co. Ltd.'s Agreement*,[54] the details of which I shall discuss in a moment.

For administrative reasons, the duty to register is being laid on business and industry in stages. The Board of Trade is empowered to promulgate orders stipulating which types of restrictive agreement are to be registered and by whom.[55] In the first order, registration of all extant agreements containing any of the statutory restrictions in respect of prices, other terms or conditions, and persons or classes of persons was required to be completed during the period 30 November, 1956, to 28 February, 1957.[56] New agreements containing such restrictions must be registered within three months of their conclusion.[57]

The initial statutory duty to communicate all essential particulars of restrictive agreements required to be registered is cast on the parties.[58] It was thought that the publicity consequent on registration might lead substantial numbers of businessmen to abandon their agreements. Some

[53] In the Notes recently issued by the Registrar of Restrictive Trading Agreements entitled, Guide to the Registration of Agreements under Part I of the Restrictive Trade Practices Act, 1956, at p. 8.

[54] [1957] 3 W.L.R. 450.

[55] ss. 9(2), 10(5).

[56] The Registration of Restrictive Trading Agreements Order, 1956.

[57] *Ibid.* By the Registration of Restrictive Trading Agreements Order, 1957, which came into force on 31st December, 1957, registration is now required by 31st March, 1958, of all extant agreements containing any of the remainder of the S.6(1) restrictions. New such agreements must be registered within three months of conclusion.

[58] s. 10(1): a several duty in the sense that proper compliance by one party discharges all others from the primary obligation: s. 10(6). However, the Registrar has power to call for further information by notice to either the communicating party or any other party to the agreement: s. 14(2).

Knowingly or recklessly giving false information or wilfully suppressing information required to be furnished are criminal offences: s. 16. Proceedings for an offence may be instituted in England and Wales only with the consent of *either* the D.P.P. *or* the Registrar: s. 17(1). For N. Ireland, the consent must be that of either the Att.-Gen. for N. Ireland or the Registrar: s. 17(1). Provision for Scotland is not in this respect included expressly in the Act.

have, but the majority appear not to have, since to date, more than 1,700 agreements have been communicated to the Registrar.

About a hundred organizations failed originally to fulfill their statutory duty, but finally came into line. A few cases of more prolonged disobedience appear to have come to light. It may be of interest to describe briefly the procedures and sanctions available to cope with such cases.

If businessmen default in their duty and fail to give particulars of their agreements within the stipulated period, they thereby commit no criminal or civil offence. The elaborate scheme of sanctions in the Act comes to bear on recalcitrants only on the motion of the Registrar; and he can move only on discovery of the uncommunicated agreement, only if, from some source or other, he has "reasonable cause to believe" that a registrable agreement is not being communicated to him or if he has positive evidence of such default strong enough to stand up in a court of law.

Should the Registrar obtain positive evidence of default, then the sanctions available are quite drastic. Application must be made by the Registrar to the High Court,[59] whereupon, if the court is "satisfied"[60] on the evidence that default has been made in furnishing particulars of an agreement which is subject to registration,

(i) it may order any party to the agreement who was named in the Registrar's application to furnish the particulars in question within a fixed time,[61] and

(ii) if the Registrar already has documents or information relating to the agreement, it may authorize their registration as though they were the entire agreement,[62] thus enabling the Registrar, if he so wishes, to argue the invalidity of the "agreement" so evidenced before the Restrictive Practices Court, to the exclusion apparently of any other relevant particulars of the agreement; and

(iii) if the High Court is "satisfied" that the default was "wilful," it may make an immediate order restraining the parties from performing their agreement or making any new agreement to like effect just as if the agreement had been adjudged by the Restrictive Practices Court to be invalid.[63] Against this order of the High Court, the parties are precluded from appealing the validity of their agreement to the Restrictive Practices Court for a period of two years.[64]

[59] Court of Session in Scotland and the High Court of N. Ireland there.

[60] s. 18(1).

[61] s. 18(1) (b). The sanction for disobedience to the order would, of course, be imprisonment or possibly a fine for contempt.

[62] s. 18 (1) (a).

[63] s. 18 (2).

[64] s. 20 (2) (b).

If the Registrar has merely "reasonable cause to believe" that a registrable agreement exists which has not been notified to him,[65] he may take advantage of certain procedures provided in the Act to probe the suspected parties. He is empowered to give notice to any person who is or may be a party to such agreement to furnish the particulars specified in the notice,[66] which is made effective by both criminal and administrative sanctions.

Thus, failure to comply with the notice "without reasonable excuse" is a summary offense.[67] More important still, the Registrar, having given a statutory notice, may apply to the High Court for an order to the person or persons concerned to attend the court and be examined on oath and to bring such documentary information as they possess for which the notice originally asked.[68]

In this way, the Registrar's reasonable suspicion may harden to certainty, and he may then register and proceed to the Restrictive Practices Court on the question of validity, or, assuming "default" to have emerged, to the High Court as described above, with the added possibility of obtaining a two years' restraint order from that court if the default was shown to be willful.

Interpretation

All questions of whether an agreement falls to be registered under the Act or whether any particulars of such agreement should be varied or removed from the register are determinable by the High Court[69] (not the Restrictive Practices Court), with appeals on either side to the Court of Appeal and thence to the House of Lords. While the issue of registrability is *sub judice*, the period fixed for registration is extended *pro tanto* for the agreement under review.[70]

Application to the High Court on these questions may be made either

[65] s. 14 (1).

[66] s. 14 (1) (3)—supported again by the criminal sanctions in s. 16 (2) and the power to ask for further particulars in s. 14 (2). The validity of the notice may probably be challenged on the ground that the Registrar did not in fact have "reasonable cause" for his belief, but was merely trying to "fish": Nakkuda Ali v. Jayaratne [1951] A.C. 66.

[67] s. 16 (1).

[68] s. 15. In all court proceedings, whether before the High Courts, Court of Session or Restrictive Practices Court, both sides are entitled to legal representation. The Registrar's counsel before the Restrictive Practices Court—*quaere* the others—are nominated by the Att.-Gen., the Lord Advocate or the Att.-Gen. for N. Ireland. The other function under the Act of the Law Officers of the Crown is a consultative one on any doubts and difficulties of interpretation the Registrar may encounter in the execution of his duties: s. 1 (3).

[69] s. 13 (2) (i). All proceedings in the High Court under Part I of the 1956 Act are assigned to the Chancery Division: Rules of the Supreme Court of Judicature (No. 3) 1956, Order LIV J, r. 2 (1).

[70] s. 13(3).

by the Registrar or by any party to the agreement.[71] In the *Austin* case,[72] the company made the application, which came before Upjohn, J. who, it may be noted, is one of the newly appointed members of the Restrictive Practices Court. The case involved the system of distribution of the Austin Motor Co. and was, therefore, important with regard to similar systems of distribution established by the manufacturers of other durable consumer and branded goods. Beyond this intrinsic significance, the case was peculiarly important as the first on the issue of registrability under the new Act.

Austin's system of wholesale and retail distribution was and is based on a division of the country into areas. Within each area cars are distributed through a single area distributor and a number of sub-area dealers and retail dealers, and also registered dealers and stocking traders. The relationship between Austin and its middlemen was previously governed by a network of standard contracts consisting of bilateral agreements between Austin and each area distributor and multilateral agreements among Austin, each area distributor and sub-area dealer, Austin, each distributor, sub-area dealer and retail dealer, and so on. The present was a test application to determine whether the new Austin agreements were subject to registration.

The principal change Austin had made was to transform all the multilateral agreements into bilateral agreements in order to bring them within the potential scope of s. 8 (3). The sample agreements before the court were those between Austin and each area distributor and between Austin and each sub-area dealer.

The full texts of the new agreements are, unfortunately, not reported. From the provisions referred to in the report it appears that the new Austin-distributor agreement includes an express exclusive dealing, s. 8(3) clause on the part of the buyer, plus s. 7(2) clauses (number of vehicles to be purchased annually; discounts; retention of show and demonstration models; and after sales service, which, it may be argued is not a s. 7(2) term), plus other statutory restrictions (control by Austin of export of secondhand Austin vehicles; the obligation to have regard to the prices in the current issue of the National Used Vehicle Price Book in fixing the part exchange allowance to be made for secondhand vehicles of any make, which, it is just arguable, may be a s. 7(2) term; and an extralegal obligation to ensure agreement between dealers regard-

[71] s. 13(2).

[72] I am deeply indebted to the Editor of the Modern Law Review for permission to repeat here the substance of a note of mine on the Austin case which appeared in the January, 1958, issue of that Review.

ing the boundaries of their respective areas subject to a reference to Austin in the event of disagreement, from which seems deducible an implied obligation on the distributor's part to keep within his own area).

The new Austin-dealer agreement is similar. It is composed of s. 8(3) clauses (exclusive dealing on the dealer's part and the obligation on the dealer to buy his cars not only from Austin but from any source Austin may nominate, i.e., impliedly, his area distributor), plus s. 7(2) clauses (as above), plus other statutory restrictions (as above, except that, in place of the distributor's extralegal obligation, the dealer is obliged, acting "as agent" for Austin, to appoint retail dealers and stocking traders in his territory in accordance with Austin's nomination or approval, thus impliedly limiting the retail middlemen with whom the dealer may trade as well as impliedly limiting the area of his trade).

Clearly, all these bilateral agreements operate against an understood background of multilateral arrangements whereby "whether enforceable at law or not . . . the parties . . . accept mutual rights and obligations."[73] For example, it is obviously understood by each distributor and dealer that every other distributor and dealer is trading on the same terms regarding price, quotas, part-exchange, etc., and that none, in particular, will trespass on the others' respective trading territories.

Thus, it was, I believe, reasonable to expect at least two main features in the Registrar's arguments in favor of registration and consequently in the judgment. First, there was the question of the implied multilateral arrangement which, had it been accepted by the court, would have disposed of the s. 8(3) issue, that section applying as mentioned above only to bilateral agreements and arrangements. To the treatment of this question by counsel and court I shall come in a moment.

Second, there were, as can be seen, a number of extremely interesting points of statutory interpretation on which the decision might have turned. What is the precise scope of s. 7(2)? Is effect to be given to s. 8(3) if the only other terms are s. 7(2) terms? Did the other clauses mentioned above constitute statutory restrictions within s. 6(1) other than s. 7(2) clauses? On the latter question, there is indeed a somewhat difficult passage in the judgment in which the learned Judge seems to have said that in fact they were s. 6(1) restrictions as distinct from those in s. 7(2). The passage runs:[74]

". . . it is not disputed that section 7 (2) does not prevent Part I of the Act from applying to the multipartite agreements with Austin, for while many

[73] [1957] 3 W.L.R., p. 460.

[74] *Ibid.*, p. 455.

conditions appear in these agreements which prima facie are within section 6 (1), but which are to be left out of account as being terms which relate exclusively to the goods supplied (for example, price controls), there are many other terms which do not so relate.

"For example, in the first tripartite form of agreement, clause 7 (a) precludes the dealer from selling or permitting to be sold any vehicle or second-hand, soiled or used vehicle of Austin's manufacture for export outside the United Kingdom without Austin's written permission. Clause 18 (a) provides that where vehicles of any make are taken in part exchange the dealer is to have regard to the prices in the current issue of the National Used Vehicle Price Book. Again, clause 20 compels the dealer to appoint in his territory retail dealers and stocking traders either in accordance with Austins' nomination or in accordance with his own nomination, provided the same be approved by Austin."

Surely, if the new agreements contain s. 8(3) terms plus s. 7(2) terms plus other statutory restrictions, they cannot be saved from registration by s. 8(3), but only if it were shown that the other party to the bilateral agreements—Austin—accepted no statutory restriction, express or implied. These points, however, were not argued. Indeed, the Solicitor-General, who appeared for the Registrar, conceded the case on s. 8(3). Despite this, the learned Judge went on to consider the s. 8(3) issue. "The Solicitor-General concedes that the new agreements satisfy the conditions contained in s. 8(3) of the Act standing by themselves, and therefore Part I does not *prima facie* apply to them. Whether that is so is the real question in this case."[75] Then, in a judgment necessarily limited by the arguments, or rather, the absence of arguments, Upjohn, J., concluded, surprisingly: "Reading these new agreements alone and without reference to the earlier history of the matter, it is clear that each of them falls within the protection afforded by s. 8(3), and the Solicitor-General does not dispute that."[76]

Nor, again, was the Solicitor-General prepared to press the matter of the implied multilateral arrangement. Perhaps Upjohn, J., took too narrow a view of his function in refusing to accept the existence of the multilateral understanding simply from the bilateral agreements looked at in the light of the history of and acknowledged reason for the change made in the form of Austin's agreements.[77] But he was prepared to listen to a submission by the Solicitor-General that the old multilateral arrangement continued in being supplementing the new agreements, and to rebutting testimony by Austin, their distributors and dealers and to a

[75] p. 456.
[76] p. 460.
[77] p. 459.

cross-examination of such testimony by the Solicitor-General. "Such a submission, however, was never made" and "the Solicitor-General disclaimed any desire to conduct . . . such cross-examination."[78]

In sum, therefore, the new Austin agreements were held not to be registrable. It is possible for them now to be referred for investigation to the Monopolies Commission, though such a reference is extremely improbable. And it is equally unlikely that their validity will now be challenged in the ordinary courts as contracts in unreasonable restraint of trade. As one sees it at present, the decision that agreements need not be registered draws in its train the virtual assumption that they may safely be regarded as valid in law.

As a first case on the registration provisions of the 1956 Act, *Austin* could hardly be more puzzling or less satisfactory. So far as the writer is aware, there is no present intention on the part of the Registrar to appeal. One can only fall back on the thought that perhaps a single case does not make a trend.

The Register and The Registry

The particulars of registrable agreements that must be furnished are the names of the parties together with all the terms of the agreement and not merely those relating to the statutory restrictions.[79] Variations of agreements must also be communicated; also termination of agreements, unless they included express time-limits.[80] The Registrar has published regulations governing the procedure and form of furnishing particulars.[81]

Registered agreements later abandoned must apparently be retained on the register:[82] at present, they are simply being indorsed as having been ended. Subsequently, a special dead section of the register may be prepared and made available for inspection. Particulars of agreements "of no substantial economic significance" will, however, be removed from the register: the determination of this politico-economic question is left to the Board of Trade on the representation of the Registrar.[83]

The register as a whole is now open to public inspection at a very modest fee,[84] save for a "special section" containing particulars regarded

[78] p. 461.

[79] s. 10(1).

[80] s. 10(2).

[81] The Registration of Restrictive Trading Agreements Regulations, 1956 (S. I. 1654).

[82] No provision to the contrary appears in the Act or in the Registrar's regulations of registration.

[83] s. 12(1).

[84] The Registration of Restrictive Trading Agreements (Fees) Regulations, 1956 (S. I. 1655). The general inspection fee is a shilling a day. The Registry and register have been established in Chancery Lane, London, with duplicate registers located in Edinburgh and Belfast.

by the Board of Trade as against the public interest to divulge, or as damaging to the legitimate business interests of any person or company because such particulars would unfairly reveal information like secret processes of manufacture.[85] Regulations governing claims to secrecy have also been issued.[86]

At present, the Registry is an evolving and expanding organization. Nothing would be gained by giving detailed figures and functions of its personnel at this stage. Those closely connected with it seem convinced that, ultimately, after a working-in period, it will emerge as an efficient and effective machine for the enforcement of the new law relating to restrictive trading agreements.[87]

Adjudication on the validity of all registered agreements is the exclusive task of the Restrictive Practices Court. I propose now to look at the nature of the court, its procedural rules, the statutory criteria of validity it will employ, the function of the Registrar in proceedings before the court, and the effect of the court's decisions and orders.

The Restrictive Practices Court

(*1*) *Personnel.* The court is staffed by a joint bench of legally qualified and lay judges. The former consists of five judges of High Court standing, three from the English High Court, one from the Court of Session of Scotland and one from the Supreme Court of N. Ireland. Mr. Justice Devlin has been appointed President of the court. The legally qualified judges may only be nominated with their consent.[88] Though members of the Restrictive Practices Court, they may still sit in their own courts should attendance on the Restrictive Practices Court not be needed,[89] as witness Upjohn, J, in the *Austin* case.

The lay judges, who are appointed by Her Majesty on the Lord Chancellor's recommendation, may be up to ten in number[90] and must be persons "appearing to the Lord Chancellor to be qualified by virtue of . . . knowledge or experience in industry, commerce or public affairs."[91] They are appointed for fixed periods of not less than three years and may be

[85] s. 11(3). Note also, s. 33(1).

[86] Registration of Restrictive Trading Agreements Regulations, 1956, Regs. 5 and 6.

[87] There is, at the time of writing, a staff of one hundred which is proving too small to cope with the need for a speedy as well as an adequate preparation of cases to go to the Restrictive Practices Court—in addition to the work of registering all communicated agreements.

[88] s. 3(4).

[89] This seems deducible from s. 3(2).

[90] s. 2(2). The Lord Chancellor has power to increase this maximum: s. 5(1) (b).

[91] s. 4(1).

reappointed.[92] Their security of tenure is qualified by the Lord Chancellor's right to remove any lay judge "for inability or misbehaviour, or on the ground of any employment or interest which appears . . . incompatible with the functions of a member of the court."[93] By written notice to the Lord Chancellor they may resign at any time.[94] Eight lay judges have been appointed in the first instance. There are three industrialists (two whole-time, one part-time), one trade unionist (whole-time), one accountant (whole-time), one former senior civil servant of the Treasury (whole-time) and one of the Ministry of Commerce of N. Ireland (part-time), and a past chairman of a public corporation, the Scottish Gas Board (part-time). Seeing that it will be the court's business to give in effect decisions on economic issues in legal form, the omission of any professional economist from membership of the court is worthy of note.

(*2*) *Procedure.* It is provided that the court may sit in plenary session or in divisions comprising one of the legally qualified judges as presiding judge, together with at least two other members of the court.[95] The central office of the court is in London, but the court or one of its divisions may sit anywhere in the United Kingdom that may prove most convenient for the determination of proceedings before it.[96] Divisions may certainly be expected to sit in London, Edinburgh, and Belfast. Hearings will be public but may take place wholly or partly *in camera*, if the court thinks fit in the light of the evidence before it.[97] The court has all the powers, rights, privileges, and authority of the High Court, except the power to order payment of costs of the winning side.[98]

The Board of Trade has been given the power to direct the Registrar in which order he should bring registered agreements before the court.[99] Two batches of sample agreements have so far been designated by the Board. However, the preliminary proceedings for the first batch have not yet been completed, and the first hearings before the court may not open until after Easter, 1958.[100]

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[92] s. 4(2).

[93] s. 4(2) (b).

[94] s. 4(2) (a).

[95] Schedule to 1956 Act, paras. 3 and 4.

[96] Schedule, para. 1.

[97] Schedule, para. 3; The Restrictive Practices Court Rules, 1957 (S. I. 603), r. 60.

[98] Schedule, para. 9. The Court may make an order for costs against a party in respect of unreasonable delay, improper, vexatious, prolix, or unnecessary steps or any other unreasonable conduct: Restrictive Practices Court Rules, r. 76.

[99] s. 1(2).

[100] See, *infra*, n. 105. 1. Some of the more important features of the first lot of agreements that will come before the Court may be of interest. They are:

Bread—National and local recommendations for minimum prices.

The rules of the Restrictive Practices Court enable the issue of validity to be disposed of summarily if it appears to the court that the agreement before it and the circumstances of the case are substantially similar to those considered in previous proceedings.[101] It will of necessity be a little time before the summary procedure can be used: its employment will be possible only as some kind of "case law" of restrictive trade agreements evolves.

The judgment of the court will be delivered by the presiding judge,[102] and, on "questions of law," his opinion, with that of any other legally qualified judges who happen to be sitting on the bench, is to prevail, that is to say, prevail over the opinion of the lay judge or judges,[103] with a right of appeal by the disappointed party to the Court of Appeal and thence to the House of Lords. On "questions of fact" the majority view of the court will prevail and will be final without right of appeal.[104]

(*3*) *Criteria of Validity and Function of The Registrar.* To the agreements coming before it, the court is required by the Act to apply the criteria set out in section 21, as follows:

"a restriction accepted in pursuance of any agreement shall be deemed to be contrary to the public interest unless the Court is satisfied of any one or more of the following circumstances, that is to say—

"(a) that the restriction is reasonably necessary, having regard to the character of the goods to which it applies, to protect the public against injury (whether to persons or to premises) in connection with the consumption, installation or use of those goods;

"(b) that the removal of the restriction would deny to the public as purchasers, consumers or users of any goods other specific and substan-

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Corrugated Paper—Fixing of prices, cutting charges and discounts to wholesalers.

Cotton Yarns—Fixing of minimum prices for single and doubled yarns.

Flour—National and regional recommendations for prices.

Hard Fibre Cordage (i.e. rope, cord and twine)—Recommendations for common or minimum prices and discounts to dealers on approved lists. Industry already reported on by Monopolies Commission.

High Conductivity Copper semi-manufactures—Recommendations for selling prices and discounts. Industry already reported on by Monopolies Commission.

Proprietary Medicinal Preparations—Distribution of certain proprietary remedies and chemists' goods only through approved wholesalers and retailers.

Shell Boilers (A type of steam raising boiler as distinct from water tube boilers)—Fixing of minimum prices for boilers and accessories and of standard discounts.

Structural Steelwork—Fixing of prices for steelwork for buildings and of maximum and minimum prices for its erection.

Woollen or Worsted Pile Carpets—Fixing of minimum prices to retailers for certain kinds of carpets and discounts to wholesalers on an approved list.

[101] Court Rules, *supra*, rr. 61–3.

[102] Schedule, para. 6.

[103] Schedule, paras. 5 and 7.

[104] *Ibid.*

tial benefits or advantages enjoyed or likely to be enjoyed by them as such, whether by virtue of the restriction itself or of any arrangements or operations resulting therefrom;

"(c) that the restriction is reasonably necessary to counteract measures taken by any one person not party to the agreement with a view to preventing or restricting competition in or in relation to the trade or business in which the persons party thereto are engaged;

"(d) that the restriction is reasonably necessary to enable the persons party to the agreement to negotiate fair terms for the supply of goods to, or the acquisition of goods from, any one person not party thereto who controls a preponderant part of the trade or business of acquiring or supplying such goods, or for the supply of goods to any person not party to the agreement and not carrying on such a trade or business who, either alone or in combination with any other such person, controls a preponderant part of the market for such goods;

"(e) that, having regard to the conditions actually obtaining or reasonably foreseen at the time of the application, the removal of the restriction would be likely to have a serious and persistent adverse effect on the general level of unemployment in an area, or in areas taken together, in which a substantial portion of the trade or industry to which the agreement relates is situated;

"(f) that, having regard to the conditions actually obtaining or reasonably foreseen at the time of the application, the removal of the restriction would be likely to cause a reduction in the volume or earnings of the export business which is substantial either in relation to the whole export business of the United Kingdom or in relation to the whole business (including export business) of the said trade or industry; or

"(g) that the restriction is reasonably required for purposes connected with the maintenance of any other restriction accepted by the parties, whether under the same agreement or under any other agreement between them, being a restriction which is found by the Court not to be contrary to the public interest upon grounds other than those specified in this paragraph, or has been so found in previous proceedings before the Court,

and is further satisfied (in any such case) that the restriction is not unreasonable having regard to the balance between those circumstances and any detriment to the public or to persons not parties to the agreement (being purchasers, consumers or users of goods produced or sold by such parties, or persons engaged or seeking to become engaged in the trade or business of selling such goods or of producing or selling similar goods) resulting or likely to result from the operation of the restriction."

In operating these rather ponderous provisions, it may be that the court will apply them, as it were, back to front; that it will decide whether the agreement is detrimental to the public, consumers, competitors, or

potential competitors while taking into account whichever ground or grounds of justification the parties to the agreement have alleged in their "statement of case."[105] What the Act does not provide is a criterion of what is detrimental to the public, etc. This, of course, is the key economic issue in the Act, but the court has been left to work out its own answer. It is difficult to suppose that its major inarticulate or articulated premise can be other than some theory of competition.

The Registrar, in taking proceedings before the court, envisages as the function of his organization that he is to give the court "all possible assistance in reaching its decision and in every-day terms this means he must try to ensure that all the cards are on the table."[106] In order to fulfill this duty, the Registrar will evidently have to ensure that the court has as the data of decision detailed evidence and statistics of the actual and probable economic consequences of agreements under dispute. The respondent parties to agreements will have to bring in similar evidence in their defence. It would seem no more than the truth to say that the Brandeis brief is on the verge of making its first appearance on the British forensic stage.

The criteria of validity raise not only the most important economic issues in the Act but also the most important legal issue. On "questions of law," but not on "questions of fact," appeal lies from the Restrictive Practices Court to the ordinary courts of law. Is, then, the application of the criteria of validity by the Restrictive Practices Court a "question of law" or a "question of fact"? The characterization of issues as ones of "fact" or "law" is itself a question of law. Therefore, the opinion of the legally qualified members of the new court will immediately prevail on this vitally important matter and, ultimately, the opinion of the House of Lords.

The reason why the question is vitally important is because, whatever and however elaborate the technical garb in which it is debated in the

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[105] In accordance with the Rules of the Court, the Registrar begins with a *notice of reference* to the parties who are called *respondents*. Respondents respond with a *statement of case* to which Registrar must deliver an *answer*. Respondents must *reply* to the answer if they intend to rely on "facts or matters which, if not raised, would be likely to take the Registrar by surprise or would raise issues of fact not arising out of the statement, of case or answer." Provision is also made for further and better particulars, discovery, amendment of notices of reference, cost investigations, etc. In addition, before the notice of reference stage, considerable time may be consumed settling which parties to agreements shall be treated as representatives of all—and some exceptional agreements have turned out to have 90,000 or more parties. Preliminaries before fixing the date for the final hearing appear capable of taking anything from five to eighteen months or even longer.

[106] Press Notice from the Office of the Registrar of Restrictive Trading Agreements, dated 16 April, 1957.

House of Lords, the real underlying issue will be simple and fundamental: is the validity of restrictive trade agreements to be determined by the specialist tribunal created by Parliament for this very purpose, or is the last word to be given to the general courts of law?

The omission from the Act of any clear expression of Parliament's wish in this matter is one of the first magnitude. At the earliest moment, an authoritative pronouncement of the House of Lords will have to be sought. If, contrary to legal expectations and presumptive canons of interpretation, their Lordships assert the *application* of the criteria of validity to be a "question of fact," its decision will form the cornerstone of a viable system of control. But if their decision goes the other way, then, in the writer's respectful opinion, this new and desirable experiment will be severely impaired at the outset—unless the Court of Appeal and House of Lords consistently follow the Restrictive Practices Court, in which case the administration of the new Act will be affected by no more than a series of unnecessary and rather farcical delays.

Consequences of Invalidity

Between the Parties. When the restrictions in an agreement are found by the Restrictive Practices Court to be contrary to the public interest, the agreement is void in respect of the restrictions in question.[107] The result is, that the agreement is unenforceable as between the parties, assuming that one or any of them no longer want to comply with the agreement. But the fact that the agreement is void does not by itself prevent the parties from continuing to carry it out if they so wish: void agreements in restraint of trade have long ceased to be criminal and prohibited in themselves:[108] hence, the power given to the new court to make a restraint order against the parties to the invalid agreement. Disobedience to the order may, of course, entail imprisonment or possibly a fine for contempt. Thus, once a restraint order has been made against a trade association in respect of its principal collective purposes, the association might as well wind itself up.

Position of Outsiders. The position of persons not parties to the restrictive trade agreement (or association) who have been injured by the collective acts of the parties *after* the agreement was adjudged void seems quite plain. A successful action for civil conspiracy will lie where the defendants combined to do unlawful acts causing loss to the plaintiff; if,

[107] s. 20(3). *Quaere*: whether, *before* adjudication, a properly registered agreement which "is deemed to be contrary to the public interest" (s. 21(1), is void for the purpose of all actions in the ordinary courts of law?

[108] See Anti-Trust Laws (ed. W. Friedmann, 1956) 346.

however, no unlawful acts were involved in the injurious activities of the combination, the latter may successfully plead that they were advancing their respective trade interests.[109]

On well-established principles, the voidness of the restrictive agreement would not in itself deprive the defendants of their special defence. But they would be defeated if a restraint order had been made against them, so converting their harmful acts into unlawful ones.

In the case of trade association activities, however, the action would have to be brought against the individual members concerned and not the association as such, because the latter, as a "trade union" within the meaning of the Trade Union Acts, 1871–1913,[110] is immune from tort actions,[111] subject to the exception under the new Act where the association members had combined to enforce resale prices.[112]

Consequences of Validity

Between the Parties. In only one respect would the parties find their hands tied if their agreement (or association) were declared valid by the court. They would still be prohibited under section 24 from exerting collective sanctions against any party in breach of a term relating to resale prices. In the case of other terms, however, the full battery of sanctions contained in the agreement might be brought to bear.[113]

It may be added here that, although in theory the jurisdiction of the general courts continues over contracts in restraint of trade involving restrictions dealt with by the new Act, that jurisdiction is unlikely again to be invoked. Where, however, contracts in restraint of trade fall outside the Act,[114] an understanding of the nature of the law of restraint of trade remains essential, and the jurisdiction of the common law courts will remain alive.

Position of Outsiders. In an action for conspiracy, the outsider would now succeed, in general, only if the validated combination had injured him for the purpose of maintaining resale prices. Otherwise, the classic defence of pursuit of trade interests would bar.

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[109] *Ibid.*, pp. 358–359.

[110] See Citrine, Trade Union Law (1950) 295 *et seq.*

[111] Trade Disputes Act, 1906, s. 4.

[112] s. 24 (8).

[113] Fining, expelling, and stop-listing by domestic tribunals of trade associations may also, of course, continue where the association does not fall within the scope of the Act, e.g. an association of businessmen who provide transport services.

[114] Like the case of contracts between the providers of services, as in Hearn v. Griffin (1815) 2 Chit. 407, or Collins v. Locke (1879) 4 App. Cas. 674.

III. Nonregistrable Agreements, Export Agreements, and Single Firm Monopoly

Nonregistrable agreements include not only agreements which have been held not to be registrable, as in the *Austin* case, but also agreements which are not registrable under the 1956 Act like exclusive dealing agreements under s. 8(3).[115]

Export agreements are those which relate exclusively to the export trade or which, if they contain any terms at all referring to home trade, contain terms not registrable under the 1956 Act.[116] All such export agreements must be notified to the Board of Trade which has opened a register for this purpose.[117] Notes for the guidance of parties to export agreements have been issued by the Board, laying down the form and substance of notification and also the order in which notification must take place.[118] It has been decided that the notification of export agreements shall parallel the registration of home trade agreements at the Registry. Thus, at present, those agreements must be transmitted to the Board which contain statutory restrictions as required by the 1956 Act in relation to price, other conditions, and persons or classes of persons, and the time limits for notification are the same as for registration.[118a]

By single firm monopoly, I refer to single companies or enterprise units which impose restraints on competition in respect of the supply acquisition or processing of goods in the home or export market, or which enjoy positions of monopoly, as defined by the 1948 Act, without recourse to specific, restrictive trade agreements or practices.

Nonregistrable agreements in the home market, export agreements, and single firm monopoly may be dealt with through the Monopolies Commission and consequential procedures provided "conditions of monopoly" exist as defined by the Monopolies and Restrictive Practices (Inquiry and Control) Act, 1948. In concluding this paper I want to indicate briefly the nature of the Monopolies Commission and its work since 1956, the vital role given by the 1948 Act to the Board of Trade, and the effect of the Commission's reports and recommendations.[119]

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[115] s. 29(1).

[116] s. 8(8). See the Board of Trade's notes (*infra*, n. 118).

[117] s. 31(1). The duty to notify and the powers of the B.O.T. to obtain information parallel the duty to register and the powers in that respect of the Registrar: s. 31(1).

[118] Board of Trade, Restrictive Trade Practices Act, 1956, Export Agreements (I.M.2), October, 1956.

[118a] All restrictive export agreements have now become notifiable under the Registration of Restrictive Trading Agreements Order, 1957: see n. 57, *supra*.

[119] The most important literature on the Monopolies Commission and its work is Yamey, The Monopolies Act, 1948 (Anti-Trust Laws, *supra*, pp. 361–402), the Annual Reports of the Board of Trade on the operation of the Acts of 1948 and 1953, and of course, the Commission's Reports, which are listed and described in the Reports of the B.O.T.

The Monopolies Commission

Under the 1948 Act, the membership of the Commission was limited to not less than four and not more than ten, including the chairman. The statutory amendment of 1953 raised the maximum to twenty-five and permitted the Commission to work in groups of not less than five members. The 1956 Act restored substantially the status quo of 1948.[120]

The chairman continues to be a full-time, pensionable appointment in recognition, it was officially stated, of the quasi-judicial nature of his work.[121] This is all that is left of the 1953 amendments. The membership of the Commission has reverted to the 1948 limits, and group working is no longer permissible. At present, there are nine members in all. The chairman is an eminent Queen's Counsel, while the remaining members, who are now all part time appointments,[122] consist of four manufacturers, an economist, a trade union official, the former Treasury Solicitor and an accountant.

Appointments are made by the Board of Trade for a period of tenure (apart from that of the chairman) of from three to seven with a possible extension to twelve years.[123] Any member may give notice of resignation at any time.[124] Conversely, if a member becomes, in the opinion of the Board, unfit to continue in office or incapable of performing his duties, the Board is empowered to notify the member that his office has been declared vacant.[125] In making appointments, the Board has aimed at securing persons of "varied outlook and experience."[126]

The Commission is responsible for appointing its staff, subject to the consent of the Board of Trade and Treasury.[127] At 31 December, 1956, the secretariat consisted of thirty-eight members.[128] The Commission may obtain the services of outside consultants and has occasionally done so. According to the last annual report of the Board of Trade, expenditure of the reduced Commission was running at an annual rate of around £80,000.[129]

[120] 1956 Act, s. 28. The Monopolies Commission was previously named the Monopolies and Restrictive Practices Commission.

[121] House of Commons Debates, 10 July, 1953, Cols. 1596–7.

[122] It was felt that insistence on full-time membership would unnecessarily limit the availability of suitable persons: see Anti-Trust Laws, *supra*, p. 363.

[123] 1948 Act, s. 1(3).

[124] s. 1(3) (c).

[125] s. 1(3) (b).

[126] Sixth Report from the Select Committee on Estimates, House of Commons, Session 1952–3, Monopolies and Restrictive Practices Commission, p.v.

[127] s. 1(5).

[128] Annual Report by Board of Trade under s. 16 of the 1948 Act, for year ending 31 December, 1957, para. 11.

[129] *Ibid.*, para. 12.

Role of The Board of Trade

In respect of investigations by the Monopolies Commission, the strategic position is occupied by the Board of Trade.

The Board's knowledge of export agreements is, as we have seen, derived now from the compulsory notification of such agreements to the Board. In the case of nonregistrable agreements and single firm monopoly, however, the Board has to rely on voluntary sources of information: traders, manufacturers, consumers, other government departments, and any other reliable informants. It is for the Board to form an initial opinion about which monopolies or agreements comply or may possibly comply with the conditions of monopoly defined by the 1948 Act.[130] In respect of the supply of goods of any description, these conditions occur "if either—

(a) at least one-third of all the goods of that description which are supplied in the United Kingdom or any substantial part thereof are supplied by or to any one person, or by or to any two or more persons, being inter-connected bodies corporate, or by or to any . . . two or more persons; or

(b) any agreements or arrangements (whether legally enforceable or not) are in operation the result of which is that, in the United Kingdom or any substantial part thereof, goods of that description are not supplied at all."[131]

The definition of one-third monopoly conditions are similar for the application of processes to and for the export of goods.[132]

The Board is given a complete discretion whether it will refer any monopoly or agreement for investigation to the Monopolies Commission.[133] Thus, while the Registrar of Restrictive Trading Agreements is under a duty to refer all registered agreements in time to the Restrictive Practices Court, no such duty rests on the Board of Trade in relation to suspected or alleged cases of single firm monopolies or registered export agreements. In theory, the Board may go to sleep on its powers: the only legal check is the annual report the Board must make on the working of the Act, which must be laid before both Houses of Parliament,[134] giving Parliament an opportunity of commenting on the Board's performance. In fact, the Board has maintained a steady flow of references to the Commission. In doing so, the Board has tended to choose

[130] s. 2(1).

[131] s. 3(1). The limits of "conditions of monopoly" are interestingly explored by Yamey in Anti-Trust Laws, *supra*, pp. 365–8.

[132] ss. 4 and 5.

[133] s. 2(1).

[134] s. 16.

monopolies and agreements that fall well within the statutory conditions and give the Commission as wide a view of the field as possible in the shortest time.

The 1948 Act confers on the Board wide powers in framing the terms of reference to the Commission.

The latter may be required to investigate and report on the facts relating to a specific individual industry solely in order to determine whether the one-third monopoly conditions in fact prevail in that industry, and, if so, "in what manner and to what extent, and . . . the things which are done by the parties concerned as a result of, or for the purpose of preserving those conditions."[135] Alternatively—and this has been the customary course—the Commission may be required not only to investigate and report on the facts but also to investigate and report whether the monopoly conditions found "operate or may be expected to operate against the public interest."[136] The Board of Trade may, under the Act, limit an investigation to the supply of goods or application of a process to goods in a specified part of the United Kingdom,[137] and may vary the terms of reference in certain other ways.[138]

In addition to these different types of references relating to specific individual industries, the Board "may at any time require the Commission to submit to them a report on the general effect on the public interest of practices of a specified class, being practices which in the opinion of the Board are commonly adopted as a result of, or for the purpose of preserving, conditions" of one-third monopoly.[139] It was under this provision that the Commission was required to make its general report on collective discrimination which led to the 1956 Act. But, it may be added, it would not be possible under this provision for the Commission to be asked to report on monopoly structure as such with a view to introducing legislation along the lines of the Clayton and Celler-Kefauver Acts, since s. 15 applies to the specific restrictive practices of single firm monopolies, not to the market power inherent in monopoly positions.

Work of The Monopolies Commission

In the meantime, the Monopolies Commission is busy with a number of references relating to the supply of goods by various single firm monopolies.[140]

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[135] s. 6(1) (a).
[136] s. 6(1) (b).
[137] s. 6(3).
[138] ss. 2(2), 6(4), 6(5).
[139] s. 15.
[140] The most interesting of recent reports has been that on the British Oxygen Company: Report on the Supply of Certain Industrial and Medical Gases, London, H.M.S.O., 1957.

The 1948 Act left the Commission free to devise its own procedure for investigating and reporting on industries or practices referred to it,[141] except that it is statutorily obliged to consider written and oral evidence from persons or associations that are substantially interested in the relevant inquiry.[142]

The precise procedure adopted in each case is set out at the beginning of each report. A fairly standard procedure has evolved. To start with, the Commission collects factual material in writing, inviting the trade associations and firms under investigation to supply information and, if necessary, answer questionnaires. Other material will come, say, from discontented customers or competitors. The Commission has always seen to it that the associations and firms affected by the reference are informed of the substance of any adverse evidence it has received. But, this evidence is not subject to cross-examination by the interested parties, nor does the Commission always inform the latter of the source and precise details of the criticisms others have levelled against them. This has given rise to the complaint that the investigated industries do not see all the evidence against them; but the practice has been defended on the grounds that the Commission would cease to get any criticism at all from customers and competitors if it had to promise to show the industry the details of every criticism that was sent to it.[143] After the preliminary accumulation of material, a private "clarification meeting" may be held at which all points of doubt are discussed and the factual information checked and agreed upon by the parties concerned.[144]

The Commission then turns its attention to forming a judgment on the question of public interest (where this is included in the terms of reference). Having first formed a conclusion, a "public interest meeting" will be held at which the parties interested submit counterarguments. These meetings are sometimes public hearings at which the parties interested can and not infrequently do appear by counsel.

On this difficult and fundamental issue of the public interest, Parliament has, in the 1948 Act, given the Commission guidance in terms so general as to be, for all practical purposes, almost completely valueless; for the Act states that,

"all matters which appear in the particular circumstances to be relevant shall be taken into account and, amongst other things, regard shall be had to the

[141] s. (1).

[142] *Ibid.*

[143] See Anti-Trust Laws, pp. 374–5.

[144] The Commission has power to enforce attendance: s. 8(3). The need for secrecy is catered for in s. 17(1).

need, consistently with the general economic position of the United Kingdom, to achieve—

"(a) the production, treatment and distribution by the most efficient and economical means of goods of such types and qualities, in such volume and at such prices as will best meet the requirements of home and overseas markets;

"(b) the organisation of industry and trade in such a way that their efficiency is progressively increased and new enterprise is encouraged;

"(c) the fullest use and best distribution of men, materials and industrial capacity in the United Kingdom; and

"(d) the development of technical improvements and the expansion of existing markets and the opening up of new markets." [145]

Consequently, the Commission has been forced to work out its own version of public policy, which it has done principally on the basis of the desirability of genuine competition in a free enterprise economy. An eminent British economist has summed up the Commission's philosophy as evidenced in the first ten reports in these words:

"In general, but subject to important qualifications, it has taken the view that more competitive conditions in industry and trade serve the public interest better than less competitive conditions. The Commission has tended to equate the interests of consumers with the public interest. It has not always thought that these interests are served solely by low prices, but has stressed the desirability that consumers should be able to choose between the more expensive and less expensive. Competition and potential competition have been considered desirable in the interests of efficient, adaptable and enterprising production and distribution to satisfy the requirements of consumers and users. Where restraints on competition have been held to be desirable in the interests of consumers and users, and where monopoly has been considered inevitable, official control and supervision of prices have been recommended to protect the public interest." [146]

To date, the Commission may be credited with two outstanding achievements: the first consists of its reports which comprise the most valuable, up to date collection of materials in existence on restrictive trade practices in Britain; while the second achievement is the high reputation for thoroughness and fairness which the Commission has gained by its work.

Results of Commission's Reports

Action taken on a general report concerning the effect on the public interest of specified practices in restraint of trade, like the report on

[145] s. 14.

[146] Yamey, Antitrust Laws. *supra*. p. 379.

collective discrimination, is entirely a matter of governmental discretion. If action is taken, its most likely form is legislation, though there is nothing to stop the government from acting on a general report through purely voluntary methods.

In the case of a general reference, it should be added, no obligation rests on the Commission to recommend courses of action to the government as a result of its investigations. Nevertheless, in the one general report it has so far been called upon to make, the Commission felt impelled to state how it thought its conclusions should be implemented, and the main substance of the 1956 Act was composed of a mixture of the majority and minority recommendations of the Commission.

In the case of specific references into the affairs of individual industries, the Commission, when it is asked to comment on the public interest aspect, is statutorily obliged to consider what type of action should be taken to remedy or prevent any mischiefs which result or may be expected to result from the monopoly conditions found, and "may, if they think fit, include recommendations as to such action in their report."[147] Generally, the Commission has included such recommendations in its reports, but the decision to act on the recommendations does not lie with the Commission; it lies with the "competent authority," by which is meant the Board of Trade or other government department that is concerned with the production of the goods or provision of the building services in question.[148]

Supine inactivity by the departments concerned is checked to a considerable degree by the provision that full reports including both fact findings and appraisal of the public interest have to be laid before each House of Parliament,[149] with the possibility of activating the procedures of asking questions and demanding debates. Up to now, however, the departments have not been inactive. Where they have not followed the Commission, they have done so only after a full consideration of the Commission's report. In the majority of instances, they have duly implemented the Commission's recommendations.

There are two forms of implementation open to the departments. The 1948 Act empowers them, if they see fit, to make statutory orders, which may prohibit or terminate any agreement or arrangement specified therein or prohibit conditional selling practices, discriminatory treatment of particular customers, or the withholding of supplies from specified

[147] s. 7(2).

[148] s. 20(1): "competent authorities," apart from the Board of Trade, are now, the Minister of Supply, Minister of Works, Minister of Fuel and Power, Minister of Health, Minister of Agriculture and Fisheries, the Admiralty and the Secretary of State.

[149] s. 9. The need for secrecy is, in this case, catered for by s. 9, proviso.

classes of customers.[150] The order may be directed against all the firms in the individual industry or against specified firms, and the prohibitions may be qualified or unqualified. Such statutory orders may not, however, go beyond the remedies just enumerated to include, for example, the breaking up of single firm monopolies or the establishment of competing state enterprises. Measures of this kind would have, at present, to be empowered by new legislation.

If a statutory order is made, it becomes enforceable at the instance either of the Crown or of any person damaged by the acts rendered unlawful (but not, it should be noted, criminal) in the order. The private person may found an action for damages in tort on the unlawfulness of the practices specified in the order, while the Crown may bring civil proceedings for an injunction or other appropriate relief.[151] No special follow-up machinery has been created through which the Crown might become aware of the violation of a statutory order. Informal channels of information have to do for the time being. At present, however, the omission is immaterial, since in only one case—that of the dental goods suppliers[152]—have the recommendations in a report been enforced by a statutory order.

The normal method of implementation adopted by the government departments has been that of private negotiation with the business interests concerned with a view to abandonment of the specific agreements or practices stigmatized by the Commission. Similar agreements or practices in industries not yet investigated are left untouched:[153] this partial effect is, of course, the natural result in its early years of the case-by-case approach which has to so large an extent found favor with official circles in Britain. To ensure the continued observance by business interests of the gentlemen's agreements thus concluded with government departments, the Board of Trade may ask the Commission to investigate and report.[154] This power has not yet been exercised.

It will be seen, then, that, in respect of single firm monopoly and export, and nonregistrable agreements, both initiative and final remedial action are almost exclusively in the hands of the government of the day. The Monopolies Commission is far from being the combined prosecutor

[150] s. 10. A statutory order may also be made if, despite a favourable report by the Commission, the House of Commons resolves that the ascertained conditions and practices operate or may be expected to operate against the public interest: s. 10(2). No such resolution has yet been passed.

[151] s. 11.

[152] Monopolies and Restrictive Practices (Dental Goods) Order, 1951 (S.I. 1200).

[153] Omitting, of course, all agreements registrable under the 1956 Act.

[154] s. 12.

and judge as hostile critics originally described it. Its relationship with the Board of Trade and other government departments is that of expert investigator and adviser. The degree of influence it may exercise over those it advises rests on the prestige with which it continues to invest itself by its work.

Conclusion

Next year, the British experiment will reach the end of its first decade. Clearly, it still has a very long way to go. Yet, though its progress has not been spectacular, it has, notwithstanding some unsatisfactory features, been steady and substantial. It has also served to awaken in British lawyers a new interest in the law of monopoly and competition in the United States, the Commonwealth, and Europe. Nor, I think, will this new experience be rendered superfluous with the coming of the European Free Trade Area. A large initial increase of competition may certainly be anticipated, but, if the past is in any way a mirror of the future, tendencies towards restraint of trade and monopoly on an international scale may be expected to follow. In dealing with international monopoly and restrictive trading agreements and practices, the British experience, along with that of other countries,[155] will provide invaluable patterns of action for the national and supranational authorities who will be concerned.

[155] Not to speak of the experience of the European Coal and Steel Community under Article 60 of its Treaty.

WILLIAM G. DANIELS

The German Law of Sales

Some Rules and Some Comparisons

INFORMATION ON FOREIGN LAWS adds to the materials available for comparative legal studies and to the store of tools that can be used in handling matters of private international law. The steady increase and intensification in trade and commerce between the nationals of different countries creates particularly a need for legal materials in the field of commercial law. The importance of our commercial relations with the German Federal Republic has increased substantially in recent years. English-language materials on German law in this field serve not only the purposes of comparative law studies in the United States but are a practical aid to the American lawyer in negotiating with foreign attorneys and in understanding their legal opinions and advice. This article on German sales law makes no pretence of profundity. Its original purpose required only a simple statement of basic principles and a general statement of rules without a precise delineation of the exact boundaries of their respective areas of application.[1] The chief source of reference for the material herein is Palandt's short but excellent commentary on the German Civil Code.[2] Numerous paragraphs of the German Civil Code are quoted in the footnotes for general reference and for the purpose of indicating something of the technique employed in the use of the Code.

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[1] The original purpose was to explain the principal features of German sales law, and particularly the features that distinguish it from Anglo-American sales law, to the military and civilian attorneys of the United States Forces in Germany. Since May 5, 1955, the military personnel and United States national employees of the United States Forces in Germany and their accompanying dependents have been subject to German law in civil matters and to the civil jurisdiction of German courts. A function of the Staff Judge Advocate offices under current Army regulations is to give legal assistance to such persons. Their troubles and misunderstandings arising from commercial transactions in the local economy now constitute a substantial portion of the legal assistance work of the Staff Judge Advocate offices in Germany. Sales constitute the bulk of such commercial transactions.

[2] Otto Palandt, Bürgerliches Gesetzbuch, (9th Edition, 1951). Only the other German references used are footnoted. Rules of American sales law herein are not supported by citation since they are stated in broad terms for comparative purposes only and their general validity can be readily tested by almost any available reference source.

Source and Nature of German Sales Law

Sales and contracts to sell are dealt with specifically in the paragraphs 433 through 514 of the German Civil Code. Contract principles generally, including those relating to sales, are dealt with in paragraphs 145 through 157 and 305 through 361. Sales and contracts of sale are further governed by the provisions of the Code applicable to obligations in general as well as by the provisions of other codes and of special laws and ordinances.[3] It goes without saying that they are subject to code provisions stating general principles which cut across the whole field of law.[4] Due to differences in the classification of legal concepts some matters generally treated in our law under the heading of contracts or sales appear in the German Civil Code under other headings. For instance, the subject of mistake is governed generally, and as it relates to contract and sales law, by paragraph 119 of the Civil Code which is found in the First Book thereof under the sub-heading of declarations.[5]

It would be difficult for an American attorney without special knowledge of German law independently to find the rule of law for a given situation even if English translations of the Civil Code and other pertinent laws and ordinances were available.[6] He should not, however, have difficulty in understanding an explanation of rules pertaining to German sales law, since the basic concept of the sales contract is the same in German as in Anglo-American law. In both laws the agreement of sale is predicated on the principle of freedom of contract and has the same basic requirements for validity. These are, assuming the parties' declarations

[3] Examples: The Commercial Code (Handelsgesetzbuch) contains special provisions relating to the normal business sales and purchases of merchants (persons and firms registered as such in the Commercial Register (Handelsregister)). Pars. 373 et seq. Special provisions relating to conditional sales contracts are contained in the Installment Payment Law of May 16, 1894 (Gesetz betreffend die Abzahlungsgeschäfte). The paragraphs 481 through 492 of the Civil Code are based on an ordinance of March 27, 1899, prescribing special rules for the sale of horses, mules, hinnies, cattle, sheep, and pigs (Verordnung betreffend die Hauptmängel und Gewährfristen beim Viehhandel). The sellers' right of stoppage in transitu is found in the Bankruptcy Ordinance of 1898 (Par. 44).

[4] German Civil Code, First Book: General Provisions (Bürgerliches Gesetzbuch, Erstes Buch: Allgemeiner Teil) pars. 1 through 240.

[5] Pars. 116 through 144. Fraud and duress (*Arglistige Täuschung und Drohung*) are also treated under this heading. Another example is the treatment of an agreement for sale of a specified chattel which, unknown to the parties, no longer existed at the time of contracting. This would be treated as a mutual mistake under Anglo-American law but falls under par. 306 (Impossibility of Performance) of the German Civil Code.

[6] The only English translation of the German Civil Code of which the writer is aware is the one made by Chung Hui Wang in 1907. All translations of the Code appearing herein are from this work. (Alternative translation by Loewy, Boston, 1909. Ed.)

are of sufficient definiteness to be actionable,[7] that the parties have capacity to contract and intend to incur legal obligations and further that their agreement is physically capable of performance and the object thereof not contrary to law or public policy. Substantial deviations in general contract or sales law concepts that might appear peculiar to the Anglo-American lawyer are relatively few. Nevertheless, they are important, and it might be well to mention some of them at the outset to provide some background against which to stage a review of some of the more specific rules of sales law.

Basic Legal Distinctions

Perhaps the first basic distinction to be noted as to contracts generally is that the doctrine of consideration is unknown to German law. Hence, many agreements can be enforced in German law which, for want of consideration, could not be supported in our law. This nonexistence is generally not of great significance in respect of a sales contract which can be defined as an agreement to transfer possession and title for a consideration. It is not without significance, however, to an offer of contract which can be binding although there is a lack of mutuality of obligation.[8]

A conceptual distinction as regards sales and the transfer of the ownership of property generally is the emphasis which German law gives to the theory that the transfer of ownership requires an agreement of the parties at the time of delivery that title is transferred. This theoretically involves in the case of a sale two distinct agreements, i.e., the agreement of sale which is obligatory in nature and imposes a duty on the seller to deliver the property to the buyer and secure to him the title[9] and the

[7] The Code provides the following guide-lines or aids for the judicial interpretation of declarations and contracts:

Par. 133:

"In the interpretation of a declaration of intention the true intention is to be sought without regard to the literal meaning of the expression."

Par. 157:

"Contracts shall be interpreted according to the requirements of good faith, ordinary usage being taken into consideration."

The use of this paragraph is of particular aid to the courts in determining the content and extent of the obligation of the contract and in filling in lacunae left by the parties.

[8] See page 475 *infra*.

[9] Par. 433:

"By a contract of sale the seller of a thing is bound to deliver the thing to the purchaser and to transfer ownership of the thing. The seller of a right is bound to transfer the right to the purchaser, and if the right involves the possession of a thing, to deliver the thing.

agreement of title transfer (*Übereignungsvertrag*) which is dispositive in nature and in which both parties must, at the time of delivery, be in agreement that the title or ownership shall pass from the seller to the buyer.[10] This agreement of title transfer made subsequent to the agreement of sale is strongly emphasized and plays an important part in the theory of German property law.[11] It accounts for some of the divergencies of the rules of German sales law from our own (although not to the extent that one might at first suppose). Thus, under German law, there can be no transfer of title of personal property without delivery.[12]

Another distinction that would attract the notice of the common-law attorney is that German sales law has no general requirement of written form as is found in the statute of frauds. The only element of that statute which finds a direct counterpart in the German Civil Code is the requirement that a promise to answer for the debt of another must be in writing.[13]

"The purchaser is bound to pay to the seller the purchase price agreed upon and to take delivery of the thing purchased."

This concept, handed down from the older German law (*gemeines Recht*), is a peculiarity of modern German law.

[10] Par. 929:

"For the transfer of ownership of a moveable it is necessary that the owner deliver the thing to the acquirer and make a real agreement with him that the ownership shall pass. If the acquirer is in possession of the thing the real agreement as to the passing of ownership is sufficient."

[11] The agreement of title transfer may be simultaneous with the agreement of sale as in the case of a cash sale. If made before delivery it must continue until the delivery to pass title. There is a rebuttable presumption that it does so. RG 135, (1932) 367.

To illustrate: S sells goods to B pursuant to an agreement that B is to pay 3 months after delivery which is made April 1. Contrary to the terms of the agreement, S had inserted in the invoice a statement that title remained in S until final payment. The statement is not noticed by B who becomes bankrupt on June 1. S could then properly demand the goods from the trustee in bankruptcy on the grounds that title had not passed because at the time of delivery there was no agreement that it should do so and hence the goods had not become part of the buyer's estate.

[12] There are of necessity certain substitutes for delivery. Where the buyer is already in possession the agreement of title transfer alone vests title. Par. 929, second sentence. Where a third party has possession delivery takes the form of an assignment to the buyer of the right to request and receive possession from the third party. Par. 931. Where title to personal property is to be transferred to secure an indebtedness of the "seller" but is to remain in his possession an agreement that the seller holds possession on behalf of the "buyer" substitutes for delivery. Par. 930. This is the German equivalent of a chattel mortgage. There is no provision for the recording of such transaction so as to give actual or constructive notice to the third parties, and the "buyer's" (creditor's) title can be defeated by the debtor's subsequent sale to an innocent purchaser for value.

[13] Par. 766. Paragraph 350 of the Commercial Code, however, provides that the cited paragraph is not applicable in the case of a registered merchant and accordingly his oral promise of surety is enforceable.

A lease for a term of more than one year must be in writing. Par. 566. A lease in German

Generally, it is standard business practice to reduce contracts to writing, or at least, to make written memoranda thereof, and it cannot be said that lack of a statute of frauds results in any notable difference in commercial practices or to an increased perpetration of frauds. A few particular types of sales contracts do require special form.[14]

No mention of doctrines basic to the German law of sales would be adequate without reference to the role played by paragraph 242 of the Civil Code.[15] The principles it is held to embody are applicable throughout the entire law of obligations. It has been developed by German courts to embrace the doctrines of *clausula rebus sic stantibus* and abuse of rights and, in general, is broader than the Anglo-American doctrine of estoppel.[16] It modifies the art and manner of the contract performance and emphasizes the duty of everyone to act in good faith in the exercise of rights and in the performance of obligations. In the case of sales, for example, it may often be invoked to restrain an abusive exercise of a contractual right. Thus, where the seller of defective goods by his conduct lulls the buyer into the belief that a satisfactory adjustment will be made and the buyer for this reason lets the six months limitation period go by without taking action the seller will not be permitted to assert the expiration of such period as a defense.[17]

Another distinctive feature of German contract law is the rather strict

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law is not considered as conveying an interest in land or real property. Other instances outside the statute of frauds in which the German Civil Code requires written form are found in paragraphs 32, 37, 81, 111, 368, 409, 410, 416, 761, 780, 781, and 792.

[14] Contracts for the sale of real property must be embodied in a writing authenticated by a notary or judge (Par. 313). The same is true of a contract to sell all or a fraction of a person's present property (Par. 311), or to sell an inheritance (Par. 2371).

[15] "The debtor is bound to effect the performance according to the requirement of good faith, ordinary usage being taken into consideration."

[16] Note also paragraph 226: "The exercise of a right which can only have the purpose of causing injury to another is unlawful."

The German courts have given this paragraph a narrow interpretation, and accordingly it has not attained the significance it might otherwise have.

[17] RG 115 (1926) 135; RG 128 (1929) 214. In the case reported in NJW 48/625 (OLG Hamburg) the buyer, who had lost all possessions in war bombings, paid an excessive price (in violation of price-ceiling laws) for furniture. It was held that the price charged constituted an improper exploitation of his economic distress. He was allowed to rescind and recover the purchase price although such recovery would normally have been barred as a matter of law.

Par. 817:

"If the purpose of an act of performance was specified in such manner that its acceptance by the recipient constitutes an infringement of a statutory prohibition or is contra bonos mores, the recipient is bound to make restitution. The claim for return is barred if the person performing is in pari delicto, unless the performance consisted in the incurring of an obligation; what has been given for the performance of such an obligation may not be demanded back."

and extensive liability imposed for negligence or other fault in precontract negotiations. This doctrine, *culpa in contrahendo*, is not expressly pronounced by the Civil Code but is a deduction of the judiciary and of legal scholars based upon a number of Code provisions which under circumstances impose a liability without contractual basis.[18] The substance of the doctrine is that the mere entering into negotiations including even the unilateral offer or solicitation of one party, although no contract results therefrom, produces a relationship akin to the contractual relationship, which imposes on the parties a duty of due care prior to and during the closing of a contract.[19] Accordingly, a party who, through his negligence has caused a misunderstanding is liable to compensate the other for the loss resulting therefrom. This applies typically to cases of offer and acceptance where one party's careless expression misleads the other into thinking there is a contract where there is none or where it is voidable. Where both parties are at fault, the rule of comparative negligence applies and the party less at fault will be compensated for such fraction of his loss as appears equitable to the court under the circumstances.[20] There is no full counterpart of the doctrine *culpa in contrahendo* in American law. American law does not generally impose liability for misleading another through ordinary mistake or negligence where there is no fraud and the facts do not permit of a finding of constructive fraud.[21]

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[18] Pars. 122, 179, 463, 663, and particularly 307 and 309. Paragraph 242 may also be considered as basis for the doctrine *culpa in contrahendo*.

[19] The duty imposed on an obligor under paragraph 276:

"A debtor is responsible, unless it is otherwise provided, for wilful default and negligence. A person who does not exercise ordinary care acts negligently. The provisions of 827, 828 apply.

"A debtor may not be released beforehand from responsibility for wilful default."

[20] Par. 254:

"If any fault of the injured party has contributed in causing the injury, the obligation to compensate the injured party and the extent of the compensation to be made depends upon the circumstances, especially upon how far the injury has been caused chiefly by the one or the other party.

"This applies also even if the fault of the injured party consisted only in an omission to call the attention of the debtor to the danger of an unusually serious injury which the debtor neither knew nor ought to have known, or in an omission to avert or mitigate the injury. The provision of 278 applies mutatis mutandis."

See also the treatment of mistake under the German Civil Code in 5, Williston on Contracts, (1937) 4471.

[21] The action is one sounding in tort for fraud or deceit. A reason for the development of the doctrine *culpa in contrahendo* is that the German law of tort, which in the Civil Code is treated as a part of the law of obligations (par. 823) does not give a remedy for the infringement of an obligatory or relative right, i.e., one which entitles an obligee to the performance by another. Paragraph 823 reads: "A person who, wilfully or negligently, un-

A distinction, presently existing more in theory than in practice, is that one to whom an obligation is owed can in principle under German law generally obtain specific performance, and the Code of Civil Procedure provides for fines and imprisonment as a means of enforcement.[22] Even the primary right of one entitled to damages is to receive restitution in kind instead of a money judgment which is, in theory at least, considered an alternative remedy.[23] Judgments issued in actions for specific performance of contract can be and generally are converted at the option of the creditor to judgments for money damages,[24] and a demand for

lawfully injures the life, body, health, freedom, property or any other right of another is bound to compensate him for any damage arising therefrom."

A person who infringes a statutory provision intended for the protection of others incurs the same obligation. If according to the purview of the statute, infringement is possible even without any fault on the part of the wrong-doer, the duty to make compensation arises only if some fault can be imputed to him."

"Other rights" within the meaning of sub-paragraph 1 means property or other "absolute" rights as to which the owner has a right as against everyone to uninfringed enjoyment.

[22] Code of Civil Procedure, pars. 883 *et seq.* Paragraph 888 contains an exception to the general rule of specific performance in the case of personal services and of marital relations.

[23] Par. 249:

"A person who is bound to make compensation shall bring about the condition which would exist if the circumstances making him liable to compensate had not occurred. If compensation is required to be made for injury to a person or damage to a thing, the creditor may demand, instead of a restitution in kind, the sum of money necessary to effect such restitution."

This means that if A destroys B's auto, the latter can demand instead of a money judgment, replacement with another auto of the same type having equal economic value. This principle has great significance for periods of worthless currency which by government fiat might purchase strictly rationed necessities but which is not voluntarily accepted by anyone in exchange for anything of value. In present day Germany, money damages are the rule. Note the effect of the second sentence of paragraph 249 *supra* and the following:

Par. 250:

"The creditor may fix a reasonable period for the restitution in kind by the person liable to compensate with a declaration that he will refuse to accept restitution after the expiration of the period. After the expiration of the period the creditor may demand the compensation in money if the restitution is not effected in due time; the claim for restitution is barred."

Par. 251:

"In so far as restitution in kind is impossible or is insufficient to compensate the creditor, the person liable shall compensate him in money.

"The person liable may compensate the creditor in money if restitution in kind is possible only through disproportionate outlay."

[24] Par. 283:

"If non-appellable judgment has been delivered against the debtor, the creditor may allot him a reasonable period for performance, with a declaration that he refuses to accept the performance after the expiration of the period. After the expiration of the period the creditor may demand compensation for non-performance, if the performance be not effected in due time; the claim for performance is barred. The liability for compensation does not arise if the performance becomes impossible in consequence of a circumstance for which the debtor

money damages precludes one from thereafter demanding specific performance.[25] It is nevertheless true that specific performance is obtainable in cases in which a money judgment would be considered by our law a full, adequate, and complete remedy. German law, in respect of remedies available to contracting parties, is more flexible and broader in scope.

General Scope of Sales Contracts

Generally, in German law as in Anglo-American law almost all things are saleable. This includes not only property, goods, and rights but also other elements of economic value, such as lottery chances, trade secrets, customers, good will, trade marks, and advertising schemes. Heat and electricity are for the purposes of sale handled like contracts for the delivery of goods and are comparable to the sale of moveables. Of course, trade in a relatively few items, such as human cadavers, is prohibited, and some rights are purely personal in nature and are not assignable. Contracts for performances prohibited by positive law or which are contrary to good morals or are usurious are void.[26]

It is not necessary that an object exist at the time of the contract of sale. If the object of sale is to be made by the seller from goods procured by him the contract is known in German as a "*Werklieferungsvertrag*". If the object of sale is of a generic nature (fully exchangeable with other items of the seller's production), the transaction is governed by the rules of sale, but if the item is made specially for the buyer and not suitable for sale to others in the regular course of the seller's business it is treated

is not responsible. If at the expiration of the period the performance is only in part not effected, the creditor has also the right specified in paragraph 280, sub-paragraph 2."

As a matter of practice the courts often specify an alternate judgment to one of specific performance so that the creditor need not bring another suit if for one reason or other there is a failure of specific performance.

Where the action is to compel the giving of an asset or permission or other declaration then the judgment has in law the same effect as if such declaration had been made by the obligor. Code of Civil Procedure, par. 894.

[25] Enneccerus-Lehmann, Lehrbuch des Bürgerlichen Rechts, Recht der Schuldverhältnisse, 14th ed., 1954, par. 53, III, 2.

[26] Par. 134:

"A juristic act which is contrary to a statutory prohibition is void, unless a contrary intention appears from the statute."

Par. 138:

"A juristic act which is contra bonos mores is void.

"A juristic act is also void whereby a person profiting by the difficulties, indiscretion or inexperience of another, causes to be promised or granted to himself or to a third party for a consideration, pecuniary advantages which exceed the value of the consideration to such an extent that, having regard to the circumstances, the disproportion is obvious."

as a contract for work and labor.[27] Also, if the purchaser supplies the material for the making of an item or supplies an item for alteration or repair the contract is not treated like one of sale but for work and labor.[28] An object need not at the time of sale be the property of the seller in which case there is an implied warranty on his part that he is able to procure it.

Offer and Acceptance

The rules of offer and acceptance are also basically the same as in Anglo-American law. No contract results, of course, unless the offer and acceptance indicate a meeting or apparent meeting of the minds.[29] Difficult cases can arise where both parties use identical but ambiguous expressions to which each party gives a different meaning, as where a price is quoted "shillings" meaning English currency and the other party believes Austrian currency is meant. The German test in such cases, like our own, is objective, and if the circumstances were such as to require one party to understand the expression in the sense meant by the other the contract has been concluded with this meaning.[30] The party intending a different meaning then has no other remedy than that of avoiding the contract because of mistake,[31] in which case he must indemnify the other party for any damages incurred in reliance upon the contract.[32] If,

[27] Par. 651:

"If the contractor binds himself to produce the work from material provided by him, he shall deliver the thing produced to the employer and convey ownership in the thing. The provisions applicable to sale apply to such a contract; if a non-fungible thing is to be produced, the provisions relating to contract for work, with the exception of 647, 648, take the place of 433, 446, par. 1, sentence 1, and of 447, 459, 460, 462 to 464, 477 to 479.

"If the contractor binds himself only to provide additions or other accessories, the provisions relating to contract for work apply exclusively."

[28] Such a contract for work and labor is known as a "*Werkvertrag*" and is governed specifically by paragraphs 631 through 651.

[29] It is possible under circumstances that a contract comes into being which was not within the contemplation of either party. Par. 140:

"If a void juristic act satisfies the requirements of a different juristic act, the former is valid in right of the latter, if it is to be presumed that its validity would have been intended by the parties on knowing of the invalidity."

[30] 58 RG (1904) 233.

[31] This is much easier than in Anglo-American law. See page 496 and the reference in note 20 *supra*.

[32] Par. 122:

"If a declaration of intention is void under 118, or avoided under 119, 120, the declarant shall, if the declaration was required to be made to another, compensate him or any third party for any damage which the other or the third party has sustained by relying upon the validity of the declaration; not, however, beyond the value of the interest which the other or the third party has in the validity of the declaration.

however, the circumstances were such that neither party could reasonably be expected to understand the expression in the sense given to it by the other then no contract has been concluded.

An offer to sell or any other offer of contract cannot be withdrawn by the offerer at any time prior to acceptance as in Anglo-American law but remains in effect for the period originally intended by the offerer as indicated by its terms or by the circumstances[33] unless the right of withdrawal is expressly reserved in the offer.[34] For example, a more or less standard form of "order" used by auto sales agencies in Germany for signature by the buyer is in legal form an offer of contract. It provides that it shall be binding for 30 days unless rejected by the offeree within that period. The result is that the offerer or buyer is bound to his offer for a period of thirty days and has no means of withdrawing it during this period except with consent of the sales agency.

Also contrary to the general American rule an acceptance by mail or other means of communication at a distance is not effective upon dispatch but rather upon receipt.[35] If the acceptance arrives late in spite of

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"The duty to make compensation does not arise if the person injured knew of the ground on which the declaration was void or voidable, or would have known of it but for his own negligence (i.e. ought to have known it)."

[33] Par. 145:

"If a person offers to another the making of a contract he is bound by the offer, unless he has excluded this obligation."

[34] Some common German terms indicating such a reservation are "*freibleibend*" (without obligation) and (specifically in sales offers) "*Preise freibleibend*" (without obligation as to prices) and "*Lieferungsmöglichkeit vorbehalten*" (subject to delivery possibilities). "*Freibleibend*" in respect of prices means that the buyer binds himself to pay an increased price in accordance with changing market conditions. "*Verkauf freibleibend*" (without obligation of contract) leaves either party free to rescind his commitment.

Other terms commonly encountered and their meanings are as follows:

"*Brutto für netto*"—Price determined by weight of goods and packing;

"*Kasse gegen Faktura*"—Payment to be made on receipt of invoice;

"*Netto Kasse*"—no discount;

"*Kassenskonto 3%*"—3% discount upon immediate cash payment;

"*Valuta 1.12 Ziel 30 Tage*"—Payment within 30 days from December 1;

"*Kasse gegen Dokumente*" oder "*Zahlung gegen Dokumente*"—Buyer to receive the bill of lading or other documents representing right to possession upon payment of the purchase price but he does not lose the right to inspect goods that have arrived;

"*Dokumente gegen Akkreditiv*"—The buyer is entitled to bill of lading, etc., upon presentation of bank letter of credit.

[35] Par. 147:

"An offer made to a person who is present may be accepted only there and then. This applies also to an offer made by one person to another on the telephone.

"An offer made to a person who is not present may be accepted only before the moment when the offerer may expect to receive an answer under ordinary circumstances."

being dispatched so that it could have ordinarily been expected to arrive on time and this is, or should be, known to the offerer, he is under a duty to notify the offeree, and if he does not a valid contract results in spite of the late arrival of the acceptance.[36]

Ordinarily, of course, silence cannot be construed as acceptance. Thus in the case of unsolicited offers or deliveries, there is no obligation on the part of the offeree to make any response. If, for instance, a person is sent razor blades through the mail with a notice that if they are not returned within 10 days such person will be presumed to have consented to their purchase, there is no duty to pay for the blades or to return them. The only obligation would be to hold them for delivery to anyone the offerer might send to pick them up. If such person simply threw the blades away he might be liable in tort under paragraph 826 of the Civil Code.[37] Silence under circumstances can, of course, be construed as consent as where an offer is made with a reservation that the offerer will not be bound by it (*"freibleibend"*), and the offeree accepts. Silence on the part of the offerer would then normally be construed as an indication of his intention to contract.[38] Paragraph 151[39] provides that the acceptance does not have to be communicated to the offerer when under the circumstances or in accordance with the practice of the trade an answer is not expected. An example is the request for a reservation made to a hotel. It is not customary for a hotel to reply unless specifically requested. To illustrate further the application of paragraph 151, suppose a buyer requests the seller to send him a number of electric lamps so that he can pick out one that harmonizes with the room for which it is intended. He does so and packs

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[36] Par. 149:

"If an acceptance arrives out of time, though it has been transmitted to the offerer in such manner that it would have arrived in due time with ordinary forwarding, and the offerer must have recognized this, on receipt of the acceptance he shall without delay notify the acceptor of the delay, unless this has already been done. If he delays so to notify him the acceptance is deemed not to have been out of time."

[37] Par. 826:

"A person who wilfully causes damage to another in a manner contra bonos mores is bound to compensate the other for the damage."

[38] The use of the term *"freibleibend"* is to be construed as making the offer a mere invitation for an offer. The offeree's acceptance is in effect a counter-offer but the conduct of the parties has been such that the offerer should immediately say so if he does not intend to contract.

[39] "A contract is concluded by the acceptance of an offer, although the acceptance is not communicated to the proposer, if such a communication is not to be expected according to ordinary usage, or if the offerer has waived it. The moment at which the offer ceases to be binding is determined according to the intention of the offerer to be inferred from the offer or the circumstances."

up the rest for return to the seller. At this point there would be a sale of the one lamp, since the seller had not asked for any particular notice of acceptance. Silence also amounts to consent by express provision of law where in the case of a sale on approval a time is set within which the offeree is to indicate his approval. Upon lapse of the time set, he is presumed to have approved of the goods and consented to the sale.[40]

Sales Contract Forms

Practically all the special forms of sale currently used in Anglo-American jurisdictions are also practiced under German law. For example, the delivery of goods to the buyer "on approval" or "on trial" or "on satisfaction" or on other similar terms in which the title does not pass to the buyer until he signifies his approval or acceptance to the seller, or does some other act which is inconsistent with the title still being in the seller is known as a "*Kauf auf Probe.*"[41] Since there is no contract until approval the risk of accidental loss or damage is on the seller, and if the offeree had paid all or part of the price he could recover the same on the principles of unjust enrichment.[42] Thus, in the above case of the electric lamps,[43] if they were all destroyed by accidental fire after the buyer selected and set the one lamp aside he would be obligated to pay for that lamp, but the destruction of the others would be the loss of the seller since the

[40] Par. 496:

"Approval of an object purchased on approval or on inspection may be declared only within the period agreed upon, and, in the absence of any such period, only before the expiration of a fixed reasonable period allotted by the seller to the purchaser. If the thing was delivered to the purchaser for the purpose of trial or inspection, his silence is deemed to be approval."

[41] Par. 495. Also called "*Kauf auf Besichtigung*" or "sale on examination". "*Kasse nach Besichtigung der Ware*" (cash after inspection of goods) means that the purchaser has a right to look at the goods and then decide whether to enter into a purchase contract or not.

Where the seller prevents inspection he runs the risk that the offeree will claim that he would have approved if allowed to inspect and bring an action for damages, as in the case of a lot of oranges at sea offered "*Kasse nach Besichtigung der Ware*" which after arrival were sold before the offeree had a chance to inspect. RG 93 (1918) 254.

[42] Par. 812:

"A person who, through an act performed by another, or in any other manner, acquires something at the expense of the latter without legal ground, is bound to return it to him. He is so bound even if a legal ground originally existing disappears subsequently, or a result originally intended to be produced by an act of performance done by virtue of a juristic act is not produced.

"Recognition of the existence or non-existence of a debt, if made under a contract, is also deemed to be an act of performance."

[43] Page 480 *supra*.

buyer would be excused of his obligation to return them.[44] The presumption of paragraph 495 is that where goods are delivered to the buyer and he has the election whether to keep them or not the parties do not intend a sale until the buyer makes his election. If the parties intend that the buyer takes delivery "on sale or return" wherein a present sale is made but the buyer has the option of returning the goods instead of paying the price, they must in some way give expression to such intention. In such case, the buyer can revest title in the seller by returning the goods within the time specified, or if no time is specified within a reasonable time.

A sale with an agreement for exchange for a similar article at the buyer's election is not regulated in the Civil Code, but the general view is that it is an unconditional sale with a right on the part of the buyer to replace the object with another. It can be exchanged for a cheaper item with partial refund of purchase price if the price difference is not substantial and the article taken in exchange is of same type as the one purchased.

"*Kauf auf Probe*" is not to be confused with a "*Kauf nach Probe*" or "*nach Muster*," which is a sale by sample.[45] A sample can be shown for the general orientation of the buyer without the sale being "per sample," in which case it is not a sale governed by paragraph 494. A difference between the goods sold per sample and those delivered, even though not substantial, will entitle the buyer to rescission of the contract or to adjustment of the price. A purchase "per sample" does not necessarily exclude liability for hidden defects, unless the sale was strictly per sample. The buyer has the burden of proving that the goods are not per sample.

In the contract of conditional sale the buyer obtains possession of the goods, but the seller, as in our law, retains the title as security until the

[44] Par. 275:

"The debtor is relieved from his obligation to perform if the performance becomes impossible in consequence of a circumstance for which he is not responsible occurring after the creation of the obligation.

"If the debtor, after the creation of the obligation, becomes unable to perform, it is equivalent to a circumstance rendering the performance impossible."

For risk of loss in general see page 484 *et seq.*

[45] Par. 494:

"In a sale according to sample or according to pattern the qualities of the sample or pattern are deemed to have been warranted."

The phrase "*Kauf zur Probe*" on the other hand has no special legal significance and merely means that the buyer may, if satisfied, place additional orders.

last installment payment is made, at which time the title automatically passes to the buyer.[46] A special law establishes the general principle that, where the seller recovers possession for nonpayment of installments, such remedy is to be treated as a rescission and the seller is only entitled to the expenses of sale, the reasonable value of the use of the chattel, and a reasonable allowance for wear and tear, taking into consideration the diminution of value of the chattel.[47] Upon recovery of the chattel by the seller for nonpayment, any sum received by him in excess of this amount must be returned to the buyer. No forfeitures are permissible, and any agreements to the contrary are void. The theory is that where the seller recovers the chattel on the basis of his title the contract is dissolved and cannot be the basis of an action for damages for breach thereof. The buyer, of course, is liable for damages if the object of sale is lost or damaged by reason of his fault.[48] Since the object of sale remains the property of the seller until the last payment, its negligent damage by the buyer would also impose a tort liability.[49] An acceleration clause making due the whole of the unpaid purchase price cannot be given effect unless the buyer is in complete or partial default on two succeeding payments and the amount of the payments in default constitutes at least 10% of the purchase price. The Installment Payment Law has no application to a buyer who is entered in the Commercial Register as a merchant (*Vollkaufmann*). Thus, if a merchant bought an auto on a conditional sales contract which provided for acceleration upon default of more than three days on any one payment, the agreement would be enforceable, and the seller could, after the buyer failed to perform within a reasonable

[46] Par. 455:

"If the seller of a moveable has reserved ownership until payment of the purchase price, it is to be presumed, in case of doubt, that the transfer of ownership takes place subject to the condition precedent of payment in full of the purchase price, and that the seller is entitled to rescind the contract, if the purchaser is in default with the payment."

[47] Installment Payment Law of May 16, 1894 (*Gesetz betreffend die Abzahlungsgeschäfte*).

[48] Par. 347:

"The claim to compensation on account of deterioration, destruction or impossibility of delivery arising from any other cause is determined, in case of rescission, and after receipt of the consideration, according to provisions which apply to the relation between an owner and a possessor after the date of action commenced on a claim of ownership. The same rule applies to the claim for delivery of, or compensation for emoluments, and to the claim for reimbursement of outlay incurred. A sum of money bears interest from the time of its receipt."

[49] Par. 823. See note 21 *supra*.

time after demand,[50] recover the chattel and maintain an action for damages.[51]

There is no provision for the recording of a contract of conditional sale so as to give actual or constructive notice to third parties. The seller can defeat an attempt by the buyer's creditor to levy execution.[52] The creditor, however, can tender the balance of the unpaid price to the seller and thus effect transfer of title to the buyer so that there is no longer an obstacle to the levy of execution on the chattel. The seller cannot prevent this result by refusing the tender[53] unless the buyer objects to it,[54] which possibility the creditor can avoid by levy of execution on the buyer's expectancy (*Anwartschaftsrecht*) and taking an assignment thereof before making tender of the balance of the purchase price to the seller.

Risk of Accidental Loss

The German Civil Code did not adopt the Roman law principle *periculum est emptoris* which transferred the risk of accidental loss of goods to the buyer upon conclusion of the sales contract. The principle of the Code is expressed in paragraph 275,[55] which, in case of accidental loss after conclusion of the contract (but before delivery), frees the seller from his obligation to deliver and in paragraph 323[56] which, in turn, frees

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[50] Par. 326:

"If, in the case of a mutual contract, one party is in default in respect of the performance due from him, the other party may allot him a fixed reasonable period for performing his part with a declaration that he will decline the performance after the expiration of the period. After the expiration of the period he is entitled to demand compensation for non-performance or to rescind the contract, if the performance has not been effected in due time; the claim for performance is barred. If the performance is in part not effected before the expiration of the period, the provision of 325, par. 1, sentence 2, applies mutatis mutandis.

"If, in consequence of the default, the performance of the contract is of no use to the other party, such other party has the rights specified in par. 1 without the fixing of a period being necessary."

[51] RG 144 (1934) 65.

[52] The seller's title is "*ein die Veräusserung hinderndes Recht*" within the meaning of paragraph 771 of the Code of Civil Procedure.

[53] Par. 268.

[54] Par. 267:

"If a debtor does not have to perform in person, a third party may effect the performance. The approval of the debtor is not necessary.

"The creditor may decline the performance if the debtor objects to it."

[55] See note 44 *supra*.

[56] "If the performance due from one party under a mutual contract becomes impossible in consequence of a circumstance for which neither he nor the other party is responsible, he loses the claim to counter-performance; in case of partial impossibility the counter-performance is diminished in conformity with 472, 473."

the buyer of his duty to pay. The result, of course, is that the risk of loss is on the seller. The time of the transfer of the risk of accidental loss chosen by the Code was the time of delivery to the buyer, obviously because from that point of time on he has possession and control of the goods.[57] In German law, delivery of the goods is necessary to transfer title, and it normally passes at the time of delivery.[58] Although the passage of title and the risk of loss are thus often concurrent, it would be false to say that risk of loss follows the title. While the delivery of goods is of the greatest importance in American law in evincing an intention to pass title, delivery is not necessary, and in the case of specific goods in a deliverable state the title passes when the contract is made, notwithstanding the time of delivery is postponed. To this extent it might be said that the *periculum est emptoris* principle of Roman law applies. It should not be assumed, however, that these differences in principles lead to appreciable differences in result. To begin with, the rules of contract under both systems of law are not compulsory but, generally, are applicable only where the parties do not evidence a contrary intention. In addition, an extremely important exception to the Civil Code rule that risk of loss is transferred with delivery applies to contracts of sale requiring shipment of the goods, in which case the risk of loss is normally borne by the buyer from the time that the seller surrenders possession

"If the other party demands delivery under 281 of the substitute received for the object owed, or assignment of the claim for compensation, he remains bound to effect the counter-performance; this is diminished, however, in conformity with 472, 473, in so far as the value of the substitute or of the claim for compensation is less than that of the value of the performance due.

"If the counter-performance has been effected which according to these provisions was not due, the value of the performance effected may be demanded back under the provisions relating to the return of unjustified benefits."

[57] Par. 446:

"On the delivery of the thing sold the risk of accidental destruction and accidental deterioration passes to the purchaser. After delivery the emoluments accrue to the purchaser, and he bears the burdens attached to the thing. If the purchaser of a piece of land is registered in the land register as owner before delivery, these consequences begin with the registration."

[58] Par. 929:

"For the transfer of ownership of a moveable it is necessary that the owner deliver the thing to the acquirer and make a real agreement with him that the ownership shall pass. If the acquirer is in possession of the thing the real agreement as to the passing of ownership is sufficient."

As to substitutes for delivery see note 12 *supra*. The transfer of a bill of lading or warehouse receipt to the buyer normally has the same effect as delivery of the goods. Commercial Code, pars. 450 and 650. RG 98 (1920) 166.

thereof to the carrier.[59] The overall similarity of purpose is readily apparent when one considers the rule of American law that where the seller delivers the goods to a carrier or other bailee for the purpose of transmission to or holding for the buyer he is presumed to have unconditionally appropriated the goods to the contract (upon which title and risk of loss passes to the buyer). Also, as in American law the risk of loss remains with the seller after delivery to the carrier if the goods are defective or are erroneously consigned, or if, as part of the transaction, the buyer gives specific instructions regarding method or means of transportation and the seller materially digresses therefrom.[60] Indeed, with respect to risk of loss, at least, it is the similarity of results rather than their divergency that surprises. It is the same, for instance, in the case of C.O.D. sales where the buyer pays before he has a right to possess (or even inspect) the goods and in the case of C.I.F. and F.O.B. sales.[61]

The Civil Code starts from the premise expressed in paragraph 269[62] that, unless a contrary intention is expressed, the seller's place of performance is the place of his residence at the time of contracting (or if his place of business is elsewhere and the contract was entered into there then in that place) and he is normally bound to do only that which is to be done at the place of performance. With respect to transportation, for instance, he has only a duty to pick a suitable carrier and no duty himself

[59] Par. 447:

"If at the request of the purchaser the seller transmits the thing sold to a place other than the place of performance, the risk passes to the purchaser as soon as the seller has delivered the thing to the forwarder, freighter, or other person or institution designated to carry out the transmission. If the purchaser has given special instructions as to the manner of forwarding, and the seller deviates from the instructions without urgent reason, the seller is responsible to the purchaser for any damage arising thereform."

Delivery to the buyer is first accomplished when the buyer or his agent acquires possession.

[60] Par. 350:

"The right of rescission is not barred by the fact that the object which the party entitled to rescind has received has been accidentally destroyed."

[61] The German equivalent of C.O.D. is "*per Nachnahme.*" Since it is customary that the buyer have a chance to look at the goods before paying, the seller's performance is defective when he sends the goods "*per Nachnahme*" unless this had been agreed which, of course, is often the case. The terms C.I.F. and F.O.B. are well understood in Germany and are used in German domestic as well as international commerce.

[62] "If a place for performance is neither fixed nor to be inferred from the circumstances, e.g., from the nature of the obligation, performance shall be effected in the place where the debtor had his domicile at the time the obligation arose.

"If the obligation arose in the conduct of the debtor's industrial operations, and if the debtor's industry is located in another place, such place is substituted for the domicile.

"It is not to be inferred from the mere circumstance that the debtor has assumed the expense of transmittal, that the place to which transmittal is required to be made is the place of performance."

to do the transporting. Thus, as we have seen, paragraph 447 transfers the risk of loss upon delivery to the carrier. The rule is based on the above theory that the seller is acting in the interest of the buyer.[63] By reason of subparagraph 3 of paragraph 269 the assumption of transportation costs by the seller, of itself, does not change the place of performance nor constitute an assumption of the risk of loss in transport. (Hence the rule regarding C.I.F. sales). In the absence of a contrary agreement the costs of transportation fall on the buyer.[64] The terms F.O.B. indicate, on the other hand, a change in the place of the seller's performance and are an expression of the rule, common to both American and German sales law, that if the contract to sell requires the seller to deliver the goods to the buyer (as distinguished from merely shipping them to him) or to deliver the goods at a particular place (as distinguished from merely shipping them there) the risk of loss does not pass to the buyer until the goods have been delivered to him or until they have reached the place agreed upon.

Surrender of possession to the carrier normally transfers not only the risk of accidental loss or damage but also generally all other types of risk such as delay in shipment etc., not attributable to the fault of the seller.[65] The buyer has a right to the assignment of the shipper's (seller's) claim against the drayage company, or carrier or any third parties arising from any loss or damage in respect of the goods.[66] The seller must transfer possession of the goods to the carrier at the place of performance, if such

[63] RG 88 (1916) 38.

[64] Par. 448:

"The costs of delivery of the thing sold, e.g. the costs of measuring and weighing, are borne by the seller; the costs of taking delivery of the thing or of forwarding the thing to a place other than the place of performance are borne by the purchaser.

"If a right is sold the costs of the creation or transfer of the right are borne by the seller."

[65] RG 99 (1920) 56; RG 115 (1926) 162; RG 114 (1926) 407.

[66] Paragraph 281:

"If, in consequence of the circumstance, which makes the performance impossible, the debtor acquires a substitute or a claim for compensation for the object owed, the creditor may demand delivery of the substitute received or assignment of the claim for compensation.

"If the creditor has a claim for compensation on account of non-performance, the compensation to be made to him is diminished, if he exercises the right specified in par. 1, by the value of the substitute received or of the claim for compensation."

Under German law in such a situation the risk of loss but not title has been transferred to the buyer. In the German concept, delivery to the drayage company or to the carrier is not delivery to the buyer. Receipt of the goods by the buyer, however, is necessary to pass title. Hence the seller remains the owner and the claim is his but he has suffered no loss. The seller in such case may nevertheless bring an action in his name for the benefit of the buyer (*Liquidation des Drittschadens*). The usual practice, of course, is for the seller to make an assignment of his claim to the buyer so that the latter may bring the action.

transfer is to have the effect of transferring the risk of loss to the buyer in accordance with paragraph 447. If the contract was made at the seller's plant at X and he ordered shipment to the buyer from his agency at Y the risk of loss would remain with him until receipt of the goods by the buyer.[67] Contrary to the American rule, if the seller uses his own delivery truck, driven by its own employees, the usual rule still applies and the risk of loss goes over to the buyer.[68] This would not be the result, however, in the case of a sale by a retail sales store. Here it is held that where delivery is made by seller's vehicle there is an implied understanding that the risk of loss is assumed by the merchant unless there is indication of another intention. In case of accidental destruction during delivery, the merchant would lose his right to the purchase price and would have to refund any payments already made.[69] Risk of accidental loss is also transferred to the buyer where the seller has tendered delivery of the goods but the buyer has refused or neglected to take delivery of the same.[70] A tender of defective goods, of course, does not put the buyer in default.

Warranty of Title

The seller warrants that the goods are free of the claims of third parties.[71] If the seller breaches his duty to deliver possession and transfer a title free from claims which third persons could assert against the buyer the latter has the normal remedies available to a party to a bilateral contract for nonperformance.[72] But where delivery has been made he cannot maintain an action for damages against the seller as long as he

[67] RG 111 (1925) 23.

[68] Apparently on the theory that the seller should not be in any worse position because he uses his own truck and driver instead of an independent drayage firm. RG 96 (1919) 250. But this is not free from doubt since there is another view holding that paragraph 447 means transfer to an independent carrier. In American law, of course, the mere placing of the goods in such a truck would not be delivery to a "carrier" within the meaning of any rules under the law of sales.

[69] Par. 323. See note 56 *supra*.

[70] Par. 324, second sub-paragraph:

"The same rule applies if the performance due from one party becomes impossible, in consequence of a circumstance for which he is not responsible, at the time when the other party is in default of acceptance."

[71] Par. 434:

"The seller is bound to transfer to the purchaser the sold object free from rights enforceable by third parties against the purchaser."

In the case of an assignment of a claim the assignor warrants the legal existence (*Verität*) of the claim but not the financial ability of the debtor to pay (*Bonität*). Par. 437.

[72] Pars. 320 through 327.

remains in undisturbed possession of the chattel.[73] Thus, if A's horse runs away and is found by B who sells and delivers it to C, the latter can, if he has not yet made payment, withhold the same until B cures the defect of title,[74] or he can return the horse and rescind the contract. C could not, however, maintain an action for damages unless C returned the horse to B without rescission, or unless C turned the horse over to A, the rightful owner, or paid A, or otherwise settled with him.[75]

Seller's Warranty of Quality

The seller also impliedly warrants that the goods at the time of the transfer of the risk of loss have no defects which materially impair the value or usefulness for ordinary purposes or for the purposes contem-

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[73] Par. 440:

"If the seller does not fulfil the obligations imposed upon him by 433 to 437, 439, the rights of the purchaser are determined according to the provisions of 320 to 327. If a moveable has been sold and delivered to the purchaser for the purpose of transfer of ownership, the purchaser may not demand compensation for non-performance on account of the right of a third party involving the possession of the thing, unless he has delivered the thing to the third party in consideration of his right, or has returned it to the seller, or unless the thing has been destroyed."

[74] Par. 320:

"A person who is bound by a mutual contract may refuse to perform his part until the other party has performed his part, unless the former is bound to perform his part first. If the performance is for the benefit of several persons, the part due to one of them can be refused until the entire counter-performance has been effected. The provision of 273, par. 3 does not apply.

"If one party has partially performed his part, counter-performance may not be refused if the refusal under the circumstances, e.g., on account of the relative insignificance of the part not performed, would constitute bad faith."

[75] Also, if after knowledge that A was the rightful owner C had sold the horse to X and then had to pay damages to A. RG 117 (1927) 335. C's liability to A in such case would follow from paragraph 990:

"If the possessor, at the time of acquiring possession, was in bad faith, he is liable to the owner under the provisions of 987, 989, as from the time of the acquisition. If the possessor subsequently learns that he is not entitled to possession, he is liable in the same manner as from the time of obtaining the knowledge. A more extensive liability of the possessor on account of default remains unaffected."

Par. 989:

"The possessor, from the date of action commenced, is responsible to the owner for any damage which arises by reason of the fact that the thing, in consequence of his fault, deteriorated, perishes, or cannot be returned by him for any other reason."

The effect of these provisions is that where a chattel is lost or stolen from the owner the one in possession even though he acquired it innocently, for value, and without knowledge is liable in damages when through his fault the chattel is lost or damaged after the owner brings suit or after the possessor has knowledge of the claim of the owner.

plated by the contract.[76] This warranty of quality attaches irrespective of any fault on the part of the seller. Liability is incurred by the seller, (1) if, at the time that the risk of accidental loss goes over to the buyer (usually upon delivery to buyer or surrender of possession to a carrier), there is a defect of quality which substantially diminishes the value or usefulness of the goods for normal uses or for those contemplated by the contract, or (2) if the goods at the time lack a quality expressly guaranteed or warranted by the seller regardless of whether the lack of such quality substantially diminishes the value or usefulness of the goods.[77] The parties, of course, can by contract exclude the warranty, but such an agreement is void if the seller fraudulently conceals a defect. The buyer's only remedies, in the absence of fault on the part of the seller, are rescission of the contract or a proportionate reduction of the purchase price[78] and in the case of generic goods (purchase by brand name or by description such as an auto of a certain make and model rather than a specific auto) the exchange of the defective item for a good one.[79] The buyer forfeits his right to rescind if he uses the object of sale or otherwise conducts himself in a manner inconsistent with an intention to rescind. It must be a substantial use not justified by the circumstances which, of course, is a question of fact.[80]

Where the buyer elects a proportionate reduction of the contract price the original contract price will have the same relation to the new adjusted

[76] Par. 459:

"The seller of a thing warrants the purchaser that, at the time when the risk passes to the purchaser, it is free from defects which diminish or destroy its value or fitness for its ordinary use or the use presupposed in the contract. An insignificant diminution in value or fitness is not taken into consideration.

"The seller also warrants that, at the time the risk passes, the thing has the promised qualities."

[77] *Id.* sub-par. 2.

[78] Par. 462:

"On account of a defect for which the seller is responsible under the provisions of 459, 460, the purchaser may demand annulment of the sale (i.e. cancellation), or reduction of the purchase price (i.e. reduction)."

[79] Par. 480:

"The purchaser of a thing designated only by species may demand, instead of cancellation or reduction, that instead of the defective thing one free from defect be delivered to him. The provisions of 464 to 466, 467, sentence 1, and 469, 470, 474 to 479, applicable to cancellation, apply mutatis mutandis to this claim.

"If, at the time at which the risk passes to the purchaser, a promised quality was absent, or if the seller has fraudulently concealed a defect, the purchaser may demand compensation for non-performance instead of cancellation, reduction, or delivery of a thing free from defect."

[80] Not based on a specific code provision but an application of the principle of paragraph 242. See note 15 *supra*.

price as the market value that would have existed if there had been no defect bears (at the time of the contract) to the actual value with the defect.[81] If the parties cannot agree on the actual market value of the defective goods such value will be fixed by the court.[82] The buyer cannot insist that the seller repair or correct the defect,[83] nor can the seller thwart the buyer's wish to rescind by an offer to repair.

The Code, in express terms, gives only the buyer the right to choose, in the case of generic goods, between rescission (or reduction of price) and acceptance of a defect-free item. Judicial decision, however, on the basis of paragraph 242 has extended the same right to the seller so that he may, provided the exchange is not accompanied by inconvenience or loss to the buyer, require the latter to accept a defect-free item instead of rescinding the contract or adjusting the price.

The Code gives the buyer the additional remedy of an action for damages for breach of contract only where the goods lack a quality expressly warranted or guaranteed by the seller or when the seller fraudulently conceals a defect.[84] Judicial interpretation has enlarged these grounds for damages to include false pretenses of the seller, as where he intentionally induces mistake on the buyer's part by pretending the existence of nonexistent qualities or facts. The seller must act fraudu-

[81] Par. 472:

"In case of reduction the purchase price shall be reduced in the proportion which at the time of the sale the value of the thing in a condition free from defect would have borne to the actual value.

"If, in the case of a sale of several things for an aggregate price, reduction is effected only in respect of some of them, then in reducing the price the aggregate value of all the things shall be taken as a basis."

This gives the formula:

$$\text{Adjusted price} = \frac{(\text{contract price}) \times (\text{market value with defect})}{(\text{what market price would have been without defect})}$$

[82] German Code of Civil Procedure, par. 3.

[83] This is the usual remedy of the buyer in the case of contracts for work, labor and materials.

[84] Par. 633:

"The contractor is bound so to produce the work that it has the promised qualities and is not affected with defects which destroy or diminish its value or fitness for its ordinary or stipulated use.

"If the work is not of such quality, the employer may demand the removal of the defect. The contractor is entitled to refuse such removal if it requires disproportionate outlay.

"If the contractor is in default in respect of the removal of the defect, the employer may himself remove the defect and claim compensation for the necessary expense."

[84] Par. 463:

"If a promised quality in the thing sold was absent at the time of the purchase, the purchaser may demand compensation for non-performance, instead of cancellation or reduction. The same rule applies if the seller has fraudulently concealed a defect."

lently. He must intend or at least be aware of the fact that the buyer if he knew the truth would not have contracted.[85] The buyer in these cases can keep the goods and demand to be put into the position he would have been in had the goods not been defective or he can reject the goods and ask damages for the total default of the contract.[86] The seller, however, is not bound for defects which were, or except for gross negligence, would have been known to the buyer at the time of contracting unless the seller warranted that the defects did not exist or fraudulently concealed their existence.[87]

In the case of a breach of warranty of quality the buyer must exercise his rights within six months after delivery of the goods except where the seller fraudulently concealed the defect,[88] or unless a longer period of guarantee was agreed. There is no remedy if the defect is not discovered before the expiration of this period. Discovery of the defect alone within the period is no aid to the buyer if the purchase price has been paid in full since he must within the period either (1) agree with the seller on

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[85] RG 63 (1906) 110.

[86] RG JW 1931, 3270; RGZ 90 (1917) 332; RGZ 103 (1921) 154.

[87] Par. 460:

"A seller is not responsible for a defect of quality in the thing sold if the purchaser knew of the defect at the time of entering into the contract. If a defect of the kind specified in 459, par. 1 has remained unknown to the purchaser in consequence of gross negligence, the seller is responsible, unless he has guaranteed that the thing is free from the defect, only if he has fraudulently concealed it."

Also par. 464:

"If the purchaser accepts a defective thing although he knows of the defect he is entitled to the claims specified in 462, 463, only if on acceptance he reserves his right on account of the defect."

Note that if the buyer accepts delivery without reservation of an obviously defective table which he negligently does not notice he can still rescind unless he knew or should have known (gross negligence) at the time of closing the contract. At the time of delivery actual knowledge is required to preclude the buyer's rights unless at that time he expressly reserves them.

[88] Par. 477:

"The claim for cancellation or reduction and the claim for compensation on account of the absence of a promised quality are barred by prescription, unless the seller has fraudulently concealed the defect, in the case of moveables in six months after delivery; in the case of land in one year after the transfer. The period of prescription may be extended by contract. If the purchaser moves for judicial admission of evidence for the purpose of preserving the evidence the prescription is thereby interrupted. The interruption continues until the termination of the proceedings. The provisions of 211, par. 2, and of 212 apply mutatis mutandis.

"The suspension or interruption of prescription of one of the claims specified in par. 1 results also in the suspension or interruption of prescription of the other claims."

rescission or reduction of the price, or (2) sue.[89] If he has not yet paid he can still withhold the purchase price to the extent that he could have prior to the expiration of the six month period, provided he has notified the seller of the defect or at least dispatched notice thereof to the seller prior to the expiration of such period.[90] The period does not start to run until the buyer actually comes into possession of the goods; thus where a sale is made of goods in the possession of a third person on June 1 and the buyer does not take possession from such third person until July 1 the period runs from the latter date.[91] It can be shortened by agreement of the parties (except where the seller fraudulently conceals a defect or makes misrepresentations),[92] and similarly it can be lengthened but not more than the regular 30 year limitation period.[93]

[89] Par. 465:

"Cancellation or reduction is effected if the seller, on demand by the purchaser, declares his consent thereto."

[90] Par. 478:

"If the purchaser has notified the seller of the defect or forwarded notice thereof to him before the claim for cancellation or reduction is barred by prescription, he may, even after the lapse of the period of prescription, refuse to pay the purchase price, in so far as he would be entitled to do so by reason of cancellation or reduction. The same rule applies if the purchaser moves for judicial admission of evidence for the purpose of preserving the evidence before the lapse of the period of prescription, or, in an action commenced between him and a subsequent acquirer of the thing on account of the defect, has given notice of the action to the seller."

If the seller has fraudulently concealed the defect, notice or an act which according to par. 1 is equivalent to notice is not necessary.

[91] Par. 187:

"If a period begins to run from an event or a point of time occurring during the course of a day, then in reckoning the period the day in which the event or the point of time occurs is not counted.

"If the beginning of a day is the point of time from which a period begins to run, then this day is counted in reckoning the period. The same rule applies to the day of birth in the reckoning of age."

Par. 193:

"If, on a given day or within a given period, a declaration of intention is required to be made or any act of performance to be done, and if the given day or the last day of the given period falls upon a Sunday or a day officially recognized in the place of making or performance as a public holiday, then the next business day takes the place of the Sunday or holiday."

Thus the first day, July 1, in this case is not counted, and the period actually starts July 2 and would normally end with the close of January 1, but this is a legal holiday, and so the period would not end until the close of the next working day.

[92] Par. 225:

"Prescription may neither be excluded nor made more onerous by juristic act. Prescription may be facilitated especially by shortening the period of prescription."

[93] Par. 195: "The regular period of prescription is thirty years."

We have thus seen that for breach of warranty of quality special rules apply. The usual remedies applying to bilateral contracts have no application to bought and delivered goods, and the provisions of paragraphs 459 *et seq.* alone govern except where the seller is guilty of fraud. They limit the buyer in his remedies and in particular impose a short six-month period of limitation. The purpose is to protect the security of commercial transactions by limiting the attack on sales contracts to certain specific grounds only which must be asserted within a short period of time.[94]

The strength of this policy is such that the principles embodied in paragraphs 459 *et seq.* are to be regarded as special provisions which generally override the considerations expressed in such doctrines as *culpa in contrahendo, clausula rebus sic stantibus,* or *bona fides.* Thus, where one year after buying an oil painting represented and believed by the seller to be a certain old master it is established that the painter was a less known relative of the old master with the same family name and that the painting was much less valuable than the parties had originally supposed, it would not help the buyer to assert that the seller was negligent in claiming the painting was by that certain old master or that the basis of the transaction, the *causa,* had failed or that in good faith he should be permitted to rescind.[95]

In view of the foregoing it is of great importance to determine what constitutes a defect of quality within the meaning of paragraph 459. The present prevailing view is that the test is subjective and that a defect is present when the object of sale unfavorably deviates in substantial manner from the characteristics contemplated by the contract or from the characteristics required for the uses contemplated by the contract. In particular, an assured characteristic within the meaning of subparagraph 2 of paragraph 459 (for the absence of which the seller is liable) is not confined to inherent qualities of the goods but embraces such extrinsic relationships which because of their nature or length of duration would be regarded generally or in the practice of the particular trade as influencing a determination of value or usefulness.[96] Thus, in the above cited case of the painting, there was no mistake as to an inherent or intrinsic quality of the painting itself. Nevertheless, since it was not by

[94] RG 135 (1932) 346; RG 161, 337.

[95] RG 135 (1932) 342. Where the seller is guilty of fraud, however, all the general contractual remedies are available to the buyer. Thus, if the seller had known at the time of the sale that the painter was not that certain old master, the 30 year limitation would have been applicable, and it would not have made any difference that the buyer did not discover the truth until a year after the sale.

[96] RG 117 (1927) 315.

the person whom both parties believed to be the artist and since production by an old master is a generally recognized element affecting the determination of value, there is a defect of quality. This would be true regardless whether the painting was a copy, a fake, or the equally valuable work of another painter. A claim by the seller as to value is to be considered a general estimation or mere opinion,[97] and, in general, opinionative and promissory representations by the seller are treated much as "trade" or "dealers talk" or "puffing" are treated in Anglo-American law.[98] No defect is involved where the goods delivered are quite different from those ordered, as where B orders oak lumber and gets hickory since hickory cannot be considered as defective oak. Ordinarily, the delivery of a different quantity than called for by the contract is not a defect of quality, but it can be such, as where A orders 3½ yards of cloth and receives 2½ together with an additional yard, which cannot be used because the suit has to be cut from the whole cloth.

The special rules applying to the sale and delivery of defective goods preclude the use of the principles that are ordinarily applied in cases of mistake. The confusingly close relationship that can exist between mistake and defect of quality is illustrated in the above case of the painting. The buyer undoubtedly acted under a mistaken belief which ordinarily would have permitted him, under German law, to rescind the contract. But since there was a breach of the seller's warranty of quality, the transaction is governed exclusively by the rules pertaining thereto which include the six-month limitation period, and since the buyer did not discover the mistake (or the defect of quality) within this period, he has no remedy. These cases can be better understood when the effect of mistake, generally, is considered.

Mistake

Mistake is regulated in the general part of the Civil Code dealing with juristic acts and applies to practically all declarations of intention.[99] Its effect is to make the declaration voidable at the option of the declarant. The avoidance operates retroactively.[100] Each party must return what

[97] RG 111 (1925) 260.

[98] RG 54 (1903) 223.

[99] The general provision applies unless the Code makes special provision for a given type of declaration. An example of a special provision is found in paragraph 2078 which states the rule of mistake as applied to wills.

[100] Par. 142:

"If a voidable juristic act is avoided it is deemed to have been void ab initio.

"If a person knew or ought to have known of the voidability, he is deemed, if the act is avoided, to have known that the juristic act was void."

he has received, if possible *in specie*, otherwise in money value pursuant to the general provisions on restitution for unjust enrichment. This is in accordance with the general rule that requires restitution whenever something has been given in performance of a contract which, for one reason or another, subsequently turns out to be void, or is avoided by one of the parties having that right, as for fraud or mistake.[101] The buyer has a 30 year period in which to discover mistakes relating to things other than quality, such as price or terms of delivery, etc. He must not be guilty of delay once the mistake is discovered.[102]

It is not necessary that the mistake be mutual or known to the other party or so obvious that it should have been known to the other party. Unilateral mistake is enough when it can be assumed that the declarant would not have made the declaration with knowledge of the actual facts and upon a reasonable appraisal of the circumstances.[103] The test is primarily subjective but has an objective element in the requirement of "a reasonable appraisal of the circumstances." Mistake exists when the declarant intends the declaration that he made but is mistaken as to its meaning, as where the offeree accepts an offer for "*Haakjoerngskoed*" under the impression that this Norwegian word for shark flesh means whale meat, or when the declarant has no intention of making a declaration of the nature given, as where A at an auction holds up a hand in greeting to a friend and the object being auctioned is knocked down to him. It is clear at the outset that the Civil Code concept of mistake is considerably broader than that of Anglo-American law. Thus, a party would be permitted to avoid a contract signed in blank or without reading if he signed it with a definite though erroneous idea as to its content or as to what its content would be.[104]

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[101] Pars. 812 *et seq.* See note 42 *supra.*

[102] Par. 121:

"The avoidance must be made, in the cases provided for by 119, 120, without delay (i.e. without culpable delay) after the person entitled to avoid has obtained knowledge of the grounds for avoidance. An avoidance as against a person who is not present is deemed to have been effected in due time if the avoidance has been forwarded without delay.

"The right of avoidance is barred if thirty years have elapsed since the making of the declaration of intention."

[103] Par. 119:

"A person who, when making a declaration of intention, was under a mistake as to its purport, or did not intend to make a declaration of that purport at all, may avoid the declaration if it is to be supposed that he would not have made it with knowledge of the state of affairs and with intelligent appreciation of the case.

"A mistake concerning any characteristics of the person or thing which are regarded in ordinary dealings as essential is also deemed to be a mistake concerning the purport of the declaration."

[104] But not where he is conscious of his ignorance of the contents and thus knowingly takes a risk. See the reference in note 20 *supra.* Compare, however, the decisions reported in RG 134 (1931) 31 and NJW 51, 705.

If the declarant is not mistaken as to the content of his declaration he cannot generally avoid its legal consequences because of erroneous suppositions or beliefs as to extrinsic matters even though they may be the cause or motive of his declaration. Thus, where A contracts to buy a house which he intends as a gift to his daughter upon her impending marriage and the daughter's engagement is then broken, he cannot avoid the contract because of his mistaken belief in the marriage at the time of contracting.

The provisions of sub-paragraph 2 of paragraph 119 respecting mistakes as to essential characteristics of the person or object of sale are generally considered exceptions to the rule excluding mere matters of motive as constituting grounds for avoidance. A mistaken belief in the net worth of an individual in a transaction involving credit is an example of the former, and a mistake as to the composition, type, or size of the object of sale an example of the latter type of mistake. The characteristics of the object of sale as to which the mistake exists must be an intrinsic element or one affecting value through a very direct relationship, such as the mistaken belief in the purchase of corporate stock shares that they were nonassessable. The value of an object or its original cost to the seller, for instance, are not such elements. Where the seller is guilty of fraud, however, the buyer can avoid the sale or contract of sale regardless of the type of mistake the seller's fraud induces.[105]

The liberal German concept of mistake is counterbalanced, however, by the rule, which has no counterpart in American law, that whoever avoids a contract because of mistake must compensate the other party for any harm suffered by the latter in reliance on the declaration.[106] The declaree is not entitled to be put into the position that he would have been in if the contract had not been avoided, i.e. to the benefit of his bargain, but is compensated, in such cases, in accordance with the "out-of-pocket-loss" rule. Of course, no liability attaches if the other party was or should have been aware of the mistake.

Buyer's Remedies (Other Than for Defective Goods)

The remedies of the buyer fall into different categories. We have already considered the special and limited remedies available for breach

[105] RG 96 (1919) 156; RG 117 (1927) 316; 129 (1930) 282.

[106] Par. 122:

"If a declaration of intention is void under 118, or avoided under 119, 120, the declarant shall, if the declaration was required to be made to another, compensate him or any third party for any damage which the other or the third party has sustained by relying upon the validity of the declaration; not, however, beyond the value of the interest which the other or the third party has in the validity of the declaration.

"The duty to make compensation does not arise if the person injured knew of the ground on which the declaration was void or voidable. or would have known of it but for his own negligence (i.e. ought to have known it)."

of the seller's warranty of quality. His other remedies follow primarily from the general Code provisions relating to bilateral contracts. It has been mentioned that under the doctrine of German law known as *culpa in contrahendo* liabilities of a contractlike nature can exist prior to and even though no contract actually comes into existence.[107] Such a case exists when the performance of one party is impossible at the time of contracting, as where the seller contracts to sell goods which at the time are no longer in existence.[108] The liability is based on fault, and the buyer accordingly can recover in damages only if the seller knows or should have known of the impossibility of performance. The buyer is not entitled to the benefit of his bargain, his damages being limited to his "out-of-pocket-losses," which may not exceed the amount of damages which would result if computed by the "benefit of bargain" rule.[109] Impossibility means actual objective impossibility by anyone and not simply inability on the seller's part. Thus, if the seller's inability to deliver the goods is because they had been consumed by fire at the time of sale, there is no contract, and the seller is liable for the buyer's "out-of-pocket" expenses, but if the inability is because the goods had been stolen by unknown persons, it is simply a case of inability on the part of the seller (because the goods could be delivered by whoever has possession) and he must respond for breach of contract, including the profit the buyer would have made if the seller had performed. In the latter case, the contract comes into existence with an implied warranty on the seller's part of his ability to perform, and the buyer has the normal remedies upon the seller's failure of performance. He is entitled to damages for the seller's nonperformance or can rescind the contract.[110] There is, of course, no such

[107] See page 475 *supra*.

[108] Par. 306:

"A contract for an impossible performance is void."

"This specialized treatment of what, in effect, is a type of mistake results from adoption of the Roman law concept *Impossibilium nulla obligatio*.

[109] Par. 307:

"A person who, in concluding a contract for an impossible performance, knew or ought to have known that it was impossible, is bound to make compensation for any damage which the other party has sustained by relying upon the validity of the contract; now, however, beyond the value of the interest which the other party has in the validity of the contract. The duty to make compensation does not arise if the other party knew or ought to have known of the impossibility.

"These provisions apply mutatis mutandis if the performance is only partially impossible, and the contract is valid in respect of the possible part, or if only one of several acts of performance promised with election between them is impossible."

[110] Par. 325:

"If the performance due from one party under a mutual contract becomes impossible in consequence of a circumstance for which he is responsible, the other party may demand

warranty where the parties express or imply another intention, as where the contract is conditioned upon the object of sale coming into existence, like future crops. If the impossibility or seller's inability occurs after the closing of the contract without the seller's fault or results from causes for which he is not responsible, he is freed from his duty to perform, and the buyer has no remedy.[111]

Where the goods are destroyed or damaged prior to delivery, the buyer can claim anything which the seller receives in payment or substitution for the loss.[112] Thus, if the seller agrees to sell a horse for $800 and the horse prior to delivery breaks a leg and has to be destroyed for which seller collects or is entitled to receive $1000 on an insurance policy, the buyer would upon tendering the contract price have a right to the $1000 insurance payment or to assignment of the claim against the insurance company.

As has been shown, the buyer can, as a general rule, obtain specific performance[113] and at the same time damages for any delay thereof. If the seller is in default with delivery of the goods, the buyer can set a time coupled with notice that after the expiration thereof he will refuse acceptance. After expiration of the period set, the buyer can no longer maintain an action for specific performance but has the choice of rescission or an action for damages.[114] The buyer cannot bring his action for damages or rescind the contract without giving the seller notice and a final chance to perform, except where notice has been expressly or impliedly waived, or where under the circumstances this could not reasonably be expected of the buyer, as where the seller has earnestly declared that he will not perform or has been guilty of gross fraud etc., or where due to the delay, the buyer no longer has an interest in the seller's performance. In the latter instance, the seller's delay must be the proximate cause of the lapse of the buyer's interest in the seller's performance. Thus, where a father orders a tuxedo to wear at his only

compensation for non-performance, or rescind the contract. In case of partial impossibility, if he has no interest in the partial performance of the contract, he is entitled, subject to the conditions specified in 280, par. 2, to demand compensation for non-performance of the entire obligation, or to rescind the entire contract. In lieu of the claim for compensation and of the right of rescission he may avail himself of the rights specified for the case provided for by 323.

"The same rule applies in the case provided for by 283, if the performance is not effected before the expiration of the period, or if at that time it is in part not effected."

If the circumstances are such that the seller cannot reasonably be expected to perform, the buyer's insistence on performance might constitute an abuse of rights. RGZ 57 (1904) 118, see page 6 supra.

[111] Par. 275. See note 44 *supra*.

[112] Par. 281. See note 66 *supra*.

[113] Page 476 *supra*.

[114] Par. 326. See note 50 *supra*.

daughter's wedding and it is doubtful if he will ever have occasion to wear it a second time, if the seller does not deliver by the time set for the wedding, it is unnecessary for the father to give notice and set a reasonable time for performance.

The buyer has a right to any papers or documents which constitute proof or evidence pertaining to the object of sale and to any information concerning legal relationships thereof.[115] If the buyer finds he has been overcharged, his only chance of avoidance would be to show that the amount charged under the circumstances was contrary to good morals, or constituted usury within the meaning of paragraph 138 of the Civil Code.[116]

Seller's Remedies

The preceding discussion has already indicated in a general way most of the seller's principal remedies. The primary right of a contracting party is fulfilment of the other party's obligation, and this affirms the seller's right in all cases to bring an action for the purchase price.[117] It is not necessary to show, as is generally required in American law, that title has passed or at least that delivery has been made. If the seller has not yet made delivery or in other manner has not yet fully performed, the judgment rendered in his favor will be conditional on his performance.[118] Once the seller has elected to rescind the contract or to seek damages for breach thereof, he cannot thereafter bring an action for the purchase price.[119] If the seller's own inability to deliver the goods is the fault of the buyer, the seller is excused from his obligation to perform

[115] Par. 444:

"The seller is bound to give to the purchaser all necessary information concerning the legal relations affecting the object sold, e.g., in the case of the sale of a piece of land, concerning the boundaries, privileges and burdens; and to deliver to him all documents serving as evidence of the right in so far as they are in his possession. If the contents of such a document relate also to other affairs, the seller is bound to give only a publicly certified extract."

The primary significance of this paragraph is in relation to sales of real property.

[116] See note 26 *supra*.

[117] See page 476 *supra*.

[118] Principle of dependent performances (*Zug-um-Zug-Leistung*). Par. 322:

"If one party brings an action for the performance due to him under a mutual contract, the enforcement of the right in the other party to refuse performance until the counter-performance has been effected has only the effect that judgment is to be delivered against the latter for contemporaneous performance.

"If the party bringing the action has to perform his part first he may, if the other party is in default of acceptance, bring an action for performance after receipt of the counter-performance.

"The provision of 274, par. 2, applies to compulsory execution."

[119] Pars. 325 and 326. See notes 50 and 110 *supra*.

but retains his claim for the purchase price[120] (minus, of course, what he saves by not performing).

After the seller puts the buyer in default by a tender of the goods which the buyer refuses or neglects to accept,[121] the risk of accidental loss or damage is shifted to the buyer just as if there had been delivery since the seller retains his claim for payment,[122] while the seller's general liability or duty of care toward the goods is reduced, since thereafter he is responsible only for his intentional acts and for gross negligence.[123] The seller can demand from a buyer thus defaulted any costs incurred by reason of the buyer's failure to take delivery.[124] The buyer has a duty to hold rejected goods for the seller.[125] Also, if the goods are damaged in transit, the buyer must protect the seller's claim against the carrier by having an expert appraise the amount of damage.[126]

The seller of goods, without any stipulation as to credit, has a right to retain possession until the price is paid or tendered. This right corresponds to the seller's lien in our law, and is based on the consideration that unless otherwise agreed delivery of the goods and payment of the

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[120] Par. 324:

"If the performance due from one party under a mutual contract becomes impossible in consequence of a circumstance for which the other party is responsible, he retains his claim for counter-performance. He must, however, deduct what he saves in consequence of release from the performance, or what he acquires or maliciously omits to acquire by a different application of his faculties.

"The same rule applies, if the performance due from one party becomes impossible, in consequence of a circumstance for which he is not responsible at the time when the other party is in default of acceptance."

[121] Par. 293:

"A creditor is in default if he does not accept the performance tendered to him."

[122] Par. 324. See note 120 *supra*.

[123] Par. 300:

"During the default of a creditor his debtor is responsible only for wilful default and gross negligence.

"If a thing designated only by species is owed, the risk passes to the creditor from the moment at which he is first in default by not accepting the thing tendered."

[124] Par. 304:

"The debtor may, in case of the default of the creditor, demand compensation for the excess of outlay which he has been obliged to incur for the ineffective tender as well as for the custody and preservation of the object owed."

[125] This is specifically provided for in paragraph 379 of the Commercial Code. But for unsolicited delivery liability is imposed only by paragraphs 823 *et seq.* of the Civil Code. See note 21 *supra*.

[126] Commercial Code, par. 438.

price are concurrent conditions.[127] The seller's right of stoppage in transit in case of the buyer's bankruptcy is also essentially the same as in American law.[128]

The unpaid seller's right, after setting a reasonable time for payment, to rescind the entire contract if the buyer does not pay before expiration of the time, is similar to our rule that the unpaid seller having a right of lien or having stopped goods in transit, may rescind the transfer of title to the buyer and assume ownership where the buyer has been in default for an unreasonable length of time. Under the German rule it is generally necessary, however, to give the buyer notice, whereas under the American rule it is not necessary to give the buyer notice, yet this could be an element determing the question whether the buyer is in default on payment an unreasonable period of time. Under the Civil Code, the seller can bring an action for damages or rescind without giving the buyer notice where this has been expressly or impliedly agreed upon or where under the circumstances notice cannot reasonably be expected of the seller.[129]

The unpaid seller who has given credit for all or part of the purchase price cannot rescind upon failure of the buyer to pay when agreed.[130] Thus, if A sells B a car upon a one-half down-payment and gives B three months within which to pay the balance of the purchase price, he cannot upon B's failure to pay after the expiration of that period rescind and sue to recover the car.

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[127] Par. 320. See note 74 *supra*.

[128] Bankruptcy Ordinance of 1898, par. 44:

"The seller or factor can demand the surrender of goods which have been sent from another place to the bankrupt and have not been fully paid for by the bankrupt, so far as the goods have not already reached the place of delivery before the beginning of the bankruptcy and come into the possession of the bankrupt or another person for him."

[129] See page 499 *supra* as to the corresponding rights of the buyer.

[130] Par. 454:

"If the seller has carried out the contract and has fixed a time for payment of the purchase price, he has not the right of rescission specified in 325, par. 2, and 326."

FARHAT J. ZIADEH

Equality (*Kafā'ah*) in the Muslim Law of Marriage

Problem of Sources

The problem of social stratification in Muslim society is a subject too wide in scope to be dealt with in a single paper. It requires investigations in time and space—a study of the major historical, literary, and legal works, as well as social surveys in various localities—far beyond the capabilities of a single individual. This paper, therefore, is an attempt to discover only how far social stratification is reflected in the doctrine of *kafā'ah* (equality) in the Muslim law of marriage. This is done in the belief that, perhaps, no criterion is more indicative of social stratification among a group than that of whom they consider equal to, and therefore worthy of, marrying their daughters.

Two preliminary observations must be made. First, once stratification is related to law, social distinction is transformed into legal distinction, and a social class becomes an "estate" recognized by law. But, as we shall have occasion to point out later, the doctrine of *kafā'ah* is not sufficiently strong or widespread to constitute "estates." Second, because of the nature of the legal sources available to us—mostly works written by Muslim jurists—our approach is what sociologists call "subjective" from the point of view of those jurists in that we accept the jurists' ranking of persons in their society according to whatever criteria they may use, and not "objective" in the sense that we ourselves place in the same category all persons occupying the same position along a selected scale regardless of the way that position is ranked by the society itself.[1]

But are we justified in assuming that the criteria used by the jurists were applied by the society in which those jurists lived? In other words, how far did the writings of jurists on this question conform to the actual state of affairs? This leads us directly into the question of the nature of *sharī'ah* or Muslim law. Is it to be looked upon as a positive and practical

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[1] For a fuller distinction between these two approaches, see Bendix, R., and Lipset, S. M., ed., Class, Status and Power (Glencoe, Ill., 1953) 226–227.

system of rules, or merely as "a religious ideal to be studied for its own sake?"[2] A thorough investigation of this problem lies outside the scope of this study. But the theory advanced by Professor Joseph Schacht,[3] that Muslim law is the result of the Islamization of Umayyad popular and administrative practice, is fairly well established. It was this Islamization or inculcation of religious overtones—encouraged by the 'Abbāsid caliphs—which raised Muslim law to a religious ideal, instead of keeping it as an essentially practical system of law. But the practicality was not entirely lost. It is true that the religious systematization of the law put crimes and penal laws—primarily because of the resulting rigidity of the *sharī'ah* principles of evidence—outside the jurisdiction of the *qāḍi* (Muslim law judge) and within the jurisdiction of the *shurṭah* (police) who were not necessarily bound by the *sharī'ah*,[4] but it is also true that the *sharī'ah* continued to govern civil obligations and questions of personal status (including questions of marriage) in the *qāḍi*'s court. Further, there is reason to believe that the Ḥanafi jurists (followers of Abu Ḥanīfah, the founder of one of the four orthodox schools, d. 150 A.H.) had to be more practical—and often more liberal—than the jurists of other schools because the Ḥanafi rite, as the rite made dominant throughout the 'Abbāsid empire by the appointment of Abu Ḥanīfah's pupil, Abu Yūsuf (d. 182 A.H.) as *qāḍi-al-quḍāh* (Chief Justice) in Baghdad, had to deal with specific problems and with actual relations between various elements of the population. It would seem also that the early scholars, as shown by the first extant book on Muslim law, *al-Muwaṭṭa'* of Mālik ibn Anas of Medina (the founder of the Māliki school, d. 179 A.H.), paid considerable attention to practical questions before the rigorous process of systematization set in.[5] Therefore it is safe to assume that *al-Muwaṭṭa'* and Ḥanafi works generally reflect a true picture at least regarding marriage. Other works, as we shall see later, seem to have followed the Iraqi-Ḥanafi doctrine on *kafā'ah*. Even if we look at all these works as representing an ideal instead of an actual state of affairs, they are not entirely without value in our quest, because even a theoretical formulation by jurists as to who is equal to whom in marriage cannot but reflect the stratification of the society in which they live.

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[2] Coulson, N. J., "Doctrine and Practice in Islamic Law," Bulletin of the School of Oriental and African Studies, Part 2, p. 220.

[3] In his The Origins of Muhammadan Jurisprudence (Oxford, 1950).

[4] Tyan, E., L'Histoire de l'Organisation Judiciaire en Pays d'Islam (Harissa, Lebanon, 1943), 360.

[5] Coulson, 2 *op. cit.*, 222.

Origin of Kafā'ah

A review of early authorities on Muslim law reveals that Mālik had nothing to say about *kafā'ah* in *al-Muwaṭṭa'*, whereas Abu Ḥanīfah, Abu Yūsuf, and Shaybāni (d. 189 A.H.), the authorities of the Ḥanafi school, recognized it.[6] Mālik is even reported to have expressly authorized the marriage of non-Arab men to Arab women, and to have said that lineage (*sharaf*) and honor (*ḥasab*) should not stand in the way of a previously married woman in marrying herself off to whomsoever she wishes,[7] while these considerations are material to the Ḥanafi doctrine of *kafā'ah*.

This dichotomy between the early authorities of the Ḥanafi and Māliki schools on this point has two possible explanations. One is that Ḥanafi law, as previously noted, was the law of the Empire and was, therefore, more prone to take up practical matters—like *kafā'ah*—than Māliki law. Ḥanafi lawyers seem to have been concerned with the practical application of the law rather than with its religious significance. But we have also noted that Mālik's *al-Muwaṭṭa'* is not entirely divorced from practicality; hence an explanation must be sought elsewhere.

An examination of the sources dealing with *kafā'ah* indicates the paucity of references to such a doctrine in pre-Islamic Arabia. Even these references, when thoroughly investigated, turn out to be spurious. Marriage in pre-Islamic Arabia does not seem to have been so highly institutionalized and regulated. The prevalence of *mut'ah* marriage[8] (marriage of "pleasure"), with its essentially temporary character, is not conducive to the emergence of a doctrine requiring the man to "measure up" to the woman before he is accepted in marriage. Such a doctrine, perforce, envisages a comparatively permanent relationship. Nor is a marriage by "purchase,"[9] which seems to have been an alternate form of marriage at the time, a more likely medium for the development of *kafā'ah* once the stipulated "purchase price" is paid, unless, of course, the ability to pay a purchase price sets men apart into social categories. Indeed this factor of ability to pay the dower (*mahr*) is taken into consideration, as we shall see later, by the doctrine of *kafā'ah*, but this is a condition of any marriage contract whether the doctrine applies or not.

[6] See, for example, Shaybāni's Al-Jāmi'al-Saghīr [printed on the margin of Abu Yūsuf, Kitāb al-Kharāj (Cairo, 1302 A.H.)], p. 32.

[7] Mālik, Al-Mudawwanah al-Kubra (Cairo, 1323 A.H.), Vol. IV, p. 13. A virgin girl, however, needs a guardian.

[8] See Smith, Robertson W., Kinship and Marriage in Early Arabia (London, 1903), 83–85.

[9] *Ibid.*, 96.

It is therefore with a great deal of suspicion that one must view references to *kafā'ah* as applying before Islam. One such reference is that mentioned by Ibn 'Abd Rabbih (d. 940 A.D.) concerning Qays ibn Zuhayr the owner of the mare Dāḥis of the Dāḥis and al-Ghabrā' War fame.[10] Qays, upon leaving the tribe of Namir ibn Qāsiṭ, among whom he had settled for a while, is reported to have said in tendering advice to them, "If you cannot find equal husbands [for your girls] then the best husband for them is the grave."[11] The same author mentions two other situations in which a fleeting allusion to *kafā'ah* is made.[12] A modern author also collects verses of pre-Islamic poetry supposedly dealing with *kafā'ah*.[13] But all these references seem to boil down to this: either the author is trying to read into ancient anecdotes and verses his own and therefore much later conception of *kafā'ah*, or he is simply relating the familiar and understandable desire on the part of a woman and her kin to have her married off in her own tribe and to shun marriage to a person of a different tribe, not because of lack of *kafā'ah* in the prospective husband in the latter case, but because of the natural tendency of a woman to stick to her own people who are her protectors even after marriage. This is not to suggest that there were no prejudices in the selection of spouses or that some tribe did not consider itself superior to others, or that the Arabs paid no attention to lineage (*nasab*) especially with regard to the male line, but these prejudices and attitudes are a far cry from the highly developed doctrine of *kafā'ah*.[14] It would seem, therefore, that Mālik's denial of the social distinctions upon which *kafā'ah* is built is due to the fact that his milieu of Medina and Ḥijāz had not developed such distinctions, while that of Abu Ḥanīfah in Kūfah and Iraq, which was more cosmopolitan and socially complex, had. The admixture of ethnic groups, the long tradition of urbanization, the existence side by

[10] A war which broke out between two tribes in Central Arabia in the second half of the sixth century on account of a race between two mares.

[11] Ibn 'Abd Rabbih, Al-'Iqd al-Farīd (Cairo, 1302 A.H.), Vol. III, p. 269.

[12] *Ibid.*, p. 276.

[13] Al-Ḥūfi, A. M., al-Mar'ah fi al-Shi'r al-Jāhili (Cairo, 1954) 132–145.

[14] Gertrude H. Stern, in her book Marriage in Early Islam (London, 1939) 38, mentions a supposed application of the doctrine of *kafā'ah* against the Prophet Muḥammad. When Muḥammad asked for the hand of his cousin Umm Hāni', her father, Abu Ṭālib, turned him down in favor of another suitor, Hubayrah of the rich tribe of Makhzūm. Dr. Stern interprets Abu Ṭālib's reply, *al-karīm yukāfi' al-karīm*, as "a man of good breeding should seek as wife a woman of equal standing." But this passage quoted from Ibn Sa'd, Tabaqāt, ed. Sachau (Leiden, 1904), Vol. VIII, p. 108, can stand no such interpretation. What Abu Ṭālib was saying was that the tribe of Makhzūm had given girls in marriage to Muḥammad's family or tribe (*inna qad ṣāharna ilayhim*) and that therefore it behooves Muḥammad's family to reciprocate, because "the noble and generous reciprocates towards the noble and generous." The question of *kafā'ah* does not arise.

side of Arab and "client" (*mawla*, pl. *mawāli*—new converts to Islam), the resulting social differentiation—all these factors were highly conducive to the development of *kafā'ah* in Iraq. This country, further, was heir to the class distinctions of the Sāsānid empire,[15] and these distinctions seem to have persisted despite the theoretical leveling process of Islam. The inescapable conclusion, therefore, is that *kafā'ah* developed in Kūfah in a milieu which recognized social distinctions, and that the doctrine spread to other localities and was adopted by other schools at a later date. This conclusion—as far as it goes—supports Goldziher[16] and Schacht[17] in their assertion that Muhammadan jurisprudence originated in Iraq. It also explains why Shāfi'i (d. 204 A.H.), the great systematizer of Muslim law and founder of the third orthodox school, deals with the doctrine only in general terms,[18] while later Shāfi'i jurists deal with it at length. Shāfi'i even refers to an argument (with which he does not seem to agree) that the doctrine was intended to protect the woman from contracting an "untrue" marriage,[19] rather than to protect her guardians from the shame of an unequal match, which is the very basis of *kafā'ah*.

The Kūfian milieu, however, does not seem to have influenced Sufyān al-Thawri (d. 161 A.H.), an Arab and a contemporary of Abu Ḥanīfah, for he rejects the lineage basis of *kafā'ah*. It is true that his Arab background recognized pedigree through the male line as a social distinction, but that background had not, as yet, evolved the legal concept that lineage was to be taken into consideration in choosing a husband for a woman. Sarakhsi's statement that Thawri, in equating himself with *Mawālis*, was expressing his humility, and that Abu Ḥanīfah—who was of Persian origin—in setting Arabs above *Mawālis* in *kafā'ah*, was expressing his also,[20] seems to us naive. Abu Ḥanīfah's student, Abu Yūsuf, who was an Arab, is reported to have said that the social differentiation on the basis of trade in the doctrine of *kafā'ah* was in deference to the custom of the people of the country [Iraq].[21]

It is worthy of note that the heterodox Ithnā-'Asharī Shī'ah do not recognize the doctrine.[22] This is surprising in view of the fact that Persian

[15] Christensen, A., L'Islam sous les Sassanides (Copenhagen, 1936) 93–94; Jāḥiẓ, Kitāb al-Tāj, ed. Aḥmad Zaki (Cairo, 1914) 25.

[16] Goldziher, I., "The Principles of Law in Islam," in 8 The Historians' History of the World (London and New York, 1908) 299.

[17] Schacht, J., The Origins of Muhammadan Jurisprudence (Oxford, 1950) 223.

[18] Shāfi'i, Kitāb al-Umm (Cairo, 1322 A.H.), Vol. V, p. 13.

[19] *Ibid.*

[20] Al-Mabsūt (Cairo, 1324 A.H.), Vol. V, p. 22.

[21] Ibn 'Ābidīn, Ḥāshiyah (Cairo, 1324 A.H.), Vol. II, p. 442.

[22] Fyzee, Asaf A.A., Outlines of Muhammadan Law (London, 1955) 92.

influence was admittedly strong in Shī'ah doctrines. Might we explain the anomaly by suggesting that the prevalence of *mut'ah* marriage among the Ithnā-'Asharīs was not favorable for the maintenance of an esteemed position for women which is necessary to the doctrine of *kafā'ah*?

Islamic Religion and Kafā'ah

We have seen that there is very little in the Arab background, but much in the Persian background, to constitute an origin for the doctrine of *kafā'ah*. But what is the position of Islam as a religion and as a system of ethics vis-à-vis this doctrine? Like many other concepts, *kafā'ah* can be supported as well as negated by quoting from the mass of contradictory traditions. But there can be no doubt there there is a preponderance of evidence to show that it is contrary to the spirit of Islam. The Koran declared that "the believers are naught else than brothers,"[23] and that "the most honored . . . in the sight of God is the most pious."[24] Muḥammad is reported to have said, "People are equal as are the teeth of a comb. There is no merit for an Arab over a non-Arab; merit is by piety."[25] When Bilāl, the Abyssinian muezzin of the Prophet, wanted to get married to an Arab girl, Muḥammad sent him to her people saying, "Tell them that the Messenger of God orders you to marry me off."[26]

There are, however, traditions to the contrary, but they are admittedly "weak." One such tradition declares, "Arabs are co-equal, tribe for tribe and man for man, and *Mawālis* are co-equal, tribe for tribe and man for man, except for a weaver or a cupper."[27] Another obviously false tradition says, "Marry off equals, and get married to equals. Be careufl in choosing [mates] for your seed. And beware of [marrying] the Negro, for he is a distorted creature."[28] Sarakhsi even tries to justify *kafā'ah* in marriage by an incident in the battle of Badr (between Muḥammad's followers and his tribe of Quraysh) during which three warriors from Quraysh refused to fight in a duel three warriors from al-Anṣār of Medina, and insisted on having, for their opposing number, their peers from the *Muhājirūn* (immigrants) of Quraysh. He argues that as long as the Prophet acceded to their demand on the ground of *kafā'ah* in fighting,

[23] Koran 49:10.

[24] Koran 49:13.

[25] Quoted in Sarakhsi, *op. cit.*, Vol. V, p. 22. For other variants, see Muttaqi, Kanz al-'Ummāl (Hyderabad, 1364 A.H.), Vol. III, p. 57. Doubtless this tradition agrees with the Koranic verses quoted above, but the fact that the earlier compendiums of *ḥadīth* do not include it, and the fact that it is polemic in character, make one believe it is spurious.

[26] Sarakhsi, *op. cit.*, Vol. V, p. 23.

[27] Muttaqi, *op. cit.*, Vol. VIII, p. 248.

[28] *Ibid.*

surely *kafā'ah* in marriage is much more important.[29] But the earlier version of this incident by Ibn Isḥāq says that the leader of the Quraysh group addressed the three Anṣār warriors saying, "You are noble and our peers, but we want our people"[30]—meaning that the Quraysh considered the fight a private matter with the "dissidents" from among their sons, not with the people of Medina.[31] The question of *kafā'ah*, therefore, did not arise, and there was no occasion for the Prophet to sanction or reject it.

Effect of Kafā'ah

Ibn Manẓūr defines *kafā'ah* in marriage as the situation in which the husband is equal to the wife in nobility (*ḥasab*), piety (*dīn*), lineage (*nasab*), family (*bayt*), etc.[32] Ḥanafi jurists, on the other hand, list six constituents of *kafā'ah*: lineage, confession of Islam, trade, liberty, piety, and means.[33] They properly lump *ḥasab* and *bayt* under *dīn*.[34] But before we take up these constituents separately a few observations about the doctrine and its effect might be in order.

It is to be noted that the doctrine requires the husband to "measure up" to the wife and not vice versa. If the wife is below him in status, he is said to raise her to his position. In any case her low status should not affect him, because "the lowliness of his bed does not annoy him," and "marriage is a kind of slavery to the woman, while the husband is master."[35] The only exception to the immateriality of the wife's status is that a guardian (*wali*), other than a father or a grandfather, should not marry his minor ward to a girl or woman who is not his equal. Such a marriage is considered void.[36] But, from a social point of view, pre-Islamic and early Islamic Arabs endeavored to marry noble women to maintain the supposedly high standard of their progeny. Men always boasted about the nobility of their maternal uncles (*khu'ūlah*). But in later ages this was forgotten, a fact which made Muḥammad 'Abduh,

[29] Sarakhsi, *op. cit.*, Vol. V, p. 23.

[30] Ibn Hishām, Sīrat al-Nabi (Cairo, Maṭba'at Hijāzi, n.d.), Vol. II, p. 265.

[31] It seems the Prophet himself was afraid that the people of Medina might not support him in an *offensive* war against the Quraysh. See Ibn Hishām, *op. cit.*, Vol. II, p. 253.

[32] *Lisān al-'Arab*.

[33] Ibn 'Ābidīn, *op. cit.*, Vol. II, p. 437.

[34] *Ḥasab* means the good, pious, or noble deeds that are attributed to a person or his ancestors.

[35] Ibn 'Ābidīn, *op. cit.*, Vol. II, p. 436.

[36] *Ibid.*, pp. 419–420.

the great Egyptian reformer, lament the "disregard of lineage and the total ignorance of ancestry."[37]

The legal effect of *kafā'ah* is that a guardian can dissolve the marriage of his female ward to a man not her equal if he (the guardian) did not consent to that marriage or was deceived in consenting to it. Such a marriage could take place under two circumstances: either the woman, being of age, marries herself off without the consent of her guardian, or a purported guardian marries a virgin off without the consent of the real guardian. In either case the marriage is voidable (unless the woman is pregnant or gives birth to a child) at the instance of the real guardian in order to protect himself and his family from the shame of a *mésalliance*.[38] Thus, the doctrine of *kafā'ah* recognizes that a marriage does not only join two individuals but two families also and establishes that the family which sets the standard for equality is the wife's family. Accordingly it would seem that the doctrine is one of the ways to protect the men of the Islamic society against the shame of a woman's supposed predilection to do wrong.

Constituents of Kafā'ah

Foremost among the constituents of *kafā'ah* is lineage. And here we must say that the family or tribal pride prevalent among the Arabs must have contributed to this element in *kafā'ah* even though the doctrine itself does not seem to be of Arab origin. Jurists, of course, attribute this element to the well-known though "weak" tradition quoted above about the relative position of Arabs and clients. A variant quoted by Kāsāni says, "Qurayshites are co-equal; [other] Arabs are co-equal, a clan for a clan and a tribe for a tribe; and *Mawalis* are co-equal, a man for a man."[39] Thus, members of the tribe of the Prophet, the Quraysh, are placed at the top of the scale. An attempt to place the Hāshimites, the family of the Prophet, higher than other Qurayshites failed, and Ibn 'Ābidīn explains away the attempt by saying it was the result of "distortions by copyists."[40] A Qurayshite is defined as any descendent of the Prophet's twelfth grandfather, al-Naḍr ibn Kinānah. Anybody descended from higher ancestors is only an Arab.[41] Arabs are co-equal except

[37] Riḍa, M. R., Ta'rīkh al-Ustādh al-Imām al-Shaykh Muḥammad 'Abduh (Cairo, 1350 A.H.), Vol. I, p. 19.

[38] Sarakhsi, *op. cit.*, Vol. V, pp. 25–26. The opinion resorted to by *Muftis* in this instance is that of Shaybāni which holds that the marriage is "untrue", i.e. void. See Ibn 'Ābidīn, *op. cit.*, Vol. II, p. 436.

[39] Badā'i' al-Ṣanā'i' (Cairo, 1327 A.H.), Vol. II, p. 319.

[40] *op. cit.*, Vol. II, p. 438.

[41] *Ibid.*, p. 438.

for the tribe of Banu Bāhilah, a branch of the Qays ʿĪlān of Muḍar. This tribe was known for its cheapness.[42] *Mawālis* are co-equal. But they are not the equals of Arabs among whom Muḥammad arose, and in whose language the Koran was revealed. Since the *Mawālis* lost their pedigree, their pride is not in lineage, but in the religion of Islam.[43]

This leads us to the second constituent, i.e. "Islam," or rather how long a person's family has been Muslim. This criterion is limited to *Mawālis*, as, indeed, is the criterion of trade because "the Arabs do not take up these trades."[44] The criterion of "Islam" stops at the third generation, so that a third generation Muslim is equal to the daughter of any non-Arab whose family has been Muslim for several generations. "*Il faut trois générations pour faire un gentleman.*"[45] But a first generation man is not the equal of a second generation girl, nor is a second generation man equal to a third generation girl. Kāsāni limits the operation of this rule, however, to localities where the Muslim religion has been dominant for some time, for, he maintains, in other localities the recent conversion to Islam should not be looked upon as a defect or a blemish.[46]

The third constituent of *kafāʾah* is freedom. In view of the existence of slavery in some localities and of its comparatively recent abolition in others, this criterion is not entirely theoretical. According to it neither a slave, a *mudabbar* (a slave to be freed after the death of the master), nor a *mukātab* (a slave who is buying off his freedom by means of a contract) is the equal of a free woman. A freedman is not the equal of an originally free woman. A free man of the second generation is not equal to a woman whose grandfather was free. But a free man of the third generation is equal to a woman who can claim freedom going back several generations, "because the designation of a person is established by the mention of the father and is completed by the mention of the grandfather."[47] A man freed by a humble person is not the equal of a maid freed by a nobleman because *walāʾ* (*literally*, loyalty: the relationship which continues between the person freed and the previous master) is similar to *nasab* or lineage. Thus if this maid marries such a man, her previous master can object.[48] A surprising statement in this regard is that a *mawla* or client (a non-Arab who embraces Islam or a descendent

[42] *Ibid.* The reason for this tribe's lowly position seems to be that its members were wont to eat leftovers and to cook the bones of dead animals to extract the fat!

[43] Sarakhsi, *op. cit.*, Vol. V, p. 24.

[44] Ibn ʿĀbidīn, *op. cit.*, Vol. II, p. 438.

[45] Quoted in Milliot, L., Droit Musulman (Paris, 1953) 294.

[46] *Op. cit.*, Vol. II, p. 319.

[47] Kāsāni, *op. cit.*, Vol. II, p. 319. See also Ibn ʿĀbidīn, *op. cit.*, Vol. II, p. 439.

[48] Ibn ʿĀbidīn, *op. cit.*, Vol. II, p. 439.

of his) is not the equal of a maid freed by Arabs.[49] While not all authors maintain this, the statement supports the adage that *walā'* is similar to *nasab* and re-emphasizes the comparatively favorable status enjoyed by slaves in Islamic countries, a status similar in many ways to that enjoyed by members of a family group.

The fourth constituent is *dīn* or piety which includes moral conduct and *hasab*. This criterion applies to both Arabs and non-Arabs.[50] And since lawyers generally are primarily concerned with the overt act, the outward forms of piety are the more important.[51] Accordingly the opinion of Shaybāni, which holds that piety is not to be taken into consideration unless the person concerned is so dissolute that he is beaten and ridiculed or ventures out into the streets while drunk and is laughed at by children, is the opinion resorted to in *fatwa* (the issuance of authoritative legal opinions), and not that of Abu Ḥanīfah or Abu Yūsuf which upholds piety unconditionally.[52] In like manner, the aids or guards of a sultan or emir, if dissolute and made fun of, are not considered equal to girls from pious and honorable families; if, however, they inspire awe in people, they are considered equal.[53]

The fifth constituent is *māl* or means, which applied to both Arabs and non-Arabs. Although some authors say that a poor man is not the equal of a rich girl, all seem to agree that essentially this means that a suitor must provide at least the prompt portion (*mu'ajjal*)—as distinguished from the deferred portion (*mu'ajjal*)—of a girl's dower, the amount of which depends upon the status of her family, and that he must provide appropriate maintenance.[54]

The sixth and final constituent is trade or calling (*ḥirfah*). Although Abu Ḥanīfah is reported to have considered it immaterial, Abu Yūsuf followed the custom of the people and gave it sanction.[55] Ibn 'Ābidīn reconciles these two divergent views by saying, "Abu Ḥanīfah based his opinion on the custom of the Arabs who let their slaves perform

[49] *Ibid.*

[50] *Ibid.*, p. 440.

[51] In fact, this emphasis on the outward form might be considered one of the mainstays of Muslim civilization.

[52] See Kāsāni, *op. cit.*, Vol. II, p. 320, and Ibn 'Ābidīn, *op. cit.*, Vol. II, p. 440. Sarakhsi, *op. cit.*, Vol. V, p. 25, quotes Abu Yūsuf as saying that if a person is discrete in his drinking habits, he is an "equal," but not if he is indiscrete. This opinion seems to agree with that of Muḥammad al-Shaybāni.

[53] Sarakhsi, *op. cit.*, Vol V, p. 25, and Ibn 'Ābidīn, *op. cit.*, Vol. II, p. 440. This is certainly a mundane rule showing that this branch of the *shari'ah* cannot be spoken of as a "religious ideal;" see *supra* p. 508.

[54] Kāsāni, *op. cit.*, Vol. II, p. 319; Sarakhsi, *op. cit.*, Vol. V, p. 25.

[55] Sarakhsi, *op. cit.*, Vol. V, p. 25.

these functions, not as a calling, and who therefore were not taunted for it. Abu Yūsuf, however, based his opinion on the custom of the people of the country, some of whom take up lowly functions as a calling and, therefore, expose themselves to taunting. In fact there is no disagreement between the two. Accordingly, if an Arab, settled in the country [outside Arabia], takes up a trade by himself, such a trade becomes material for purposes of *kafā'ah*."[56] According to Kāsāni, however, some copies of *al-Jāmi' al-Ṣaghīr* of Shaybāni say that Abu Ḥanīfah considered trade as material for *kafā'ah*, whereas Abu Yūsuf considered it immaterial unless it is truly degrading like weaving, cupping, or tanning.[57] It is submitted that this latter statement is consonant with what we know of Persian and Arab traditions.[58]

The thirteenth/nineteenth century jurist, Ibn 'Ābidīn gives in his *Ḥāshiyah*[59] an interesting and extensive account of the role which trade plays in determining *kafā'ah*. His account has the advantage of being a gloss on an earlier work which in turn is a commentary on a still earlier one.[60] Thus, he presents views of somewhat earlier times as well as those of his day, with the resultant indication of a shift in the relative status of some trades.[61] Earlier Ḥanafi works like *al-Mabsūṭ* by Sarakhsi (d. 483 A.H.) and *Badā'i' al-Ṣanā'i'*,[62] by Kāsāni (d. 587 A.H.) arrange trades into two categories: the lower trades, which include the weaver, cupper, tanner, street cleaner, cobbler, and veterinarian, and the higher trades, which include the sellers of spices, cloth and similar materials, jewelers, and money-changers. A member of the first category is not the equal of a member of the second for purposes of *kafā'ah*. The distinction would seem to rest on whether a person performs manual labor of a not too precise a nature and whether or not the things he deals with are "dirty." Ḥaskafi, the author of *al-Durr al-Mukhtār*, adds another occupation, tailoring, which he places between these two broad categories, presumably because it entails manual operations of some skill on materials that are not "dirty." He adds two other categories which, strictly speaking, are not trades or crafts. At the top of the scale,

[56] *Op. cit.*, Vol. II, p. 442. See also Kāsāni, *op. cit.*, Vol. II, p. 320 where this explanation was originally presented.

[57] *Op. cit.*, Vol. II, p. 320.

[58] See *supra*, p. 507.

[59] Vol. II, pp. 441–443.

[60] The *Ḥāshiyah*, which is called *Radd al-Muḥtār*, is a gloss on *al-Durr al-Mukhtār*, by Ḥaskafi (d. 1088 A.H.) which is a commentary on *Tanwīr al-Abṣār*, by Timirtāshi (d. 1004 A.H.).

[61] Vol. V, p. 25.

[62] Vol. II, p. 320.

he places the ulema and the judges, and at the bottom he places the "retainers of despots."[63] Holders of positions in a *waqf* (religious endowment) are the equals of merchants, unless the position is lowly like that of a porter or doorkeeper.[64]

Ibn 'Ābidīn's addition to this scheme consists of four elements. In the first place, following other jurists, he adds some trades to the lowly category: barber, blacksmith, coppersmith, watchman, shepherd, groom, and bath-keeper. But at the same time he qualifies the scheme by saying that the lowliness is not absolute, for it depends upon the custom of the locality. According to him a weaver in Alexandria is the equal of the merchant of spices because the former is quite respectable there.[65] In the second place, he recognizes the higher status of an entrepreneur in the lower trades. Thus an entrepreneur (*ustādh*) who employs others to do the tailoring or cobbling is the equal of a seller of spices or cloth.[66] In the third place, he seems to be unhappy about placing the "retainers of despots" at the bottom of the list, which he reserves for the cleaners of privies. He admits that the latter clean mosques of impurities (a laudatory act) while the former may confiscate the property of others (a reprehensible one). Nevertheless, he says that it is preferable for a woman to marry a retainer of despots rather than even a weaver or a tanner, let alone a cleaner of privies. He explains the low position assigned to the retainers of despots by jurists of previous centuries by saying, "During their time, merit was by piety, but in our time, merit is predominantly by mundane things."[67] In the fourth place, he tries to assign various degrees of importance to some of the factors constituting *kafā'ah*. This is important in situations where two individuals might be of the same trade but differ with regard to lineage or knowledge of the religious sciences. He says that a non-Arab merchant of spices is not the equal of an Arab merchant or of a learned merchant of spices. Further, an ignorant, non-Arab merchant of spices is not the equal of an Arab barber or of a learned barber.[68] But as to the relative importance of lineage and knowledge, he differs from some previous jurists, including Timirtāshi and Ḥaskafi, who placed the former above the latter. He approvingly quotes Qāḍi Khān in saying that a learned non-Arab is equal to an 'Alawite girl (one descended from 'Ali) because the honor of knowledge (*'ilm*) is above the honor of lineage.[69]

[63] See Ibn 'Ābidīn, *op. cit.*, Vol. II, p. 442.
[64] *Ibid.*, p. 443.
[65] *Ibid.*, p. 442.
[66] *Ibid.*
[67] *Ibid.*, p. 443.
[68] *Ibid.*, p. 442.
[69] Ibid., pp. 443–444.

Instances of Kafā'ah

That the doctrine of *kafā'ah* is not entirely theoretical, as might be supposed because of the admittedly difficult task of establishing its constituents—e.g. *ḥasab*, *dīn*, and *'ilm*—is shown by the fact that there have been some instances in Muslim society in which it was invoked. However, the lack of law reports in those areas of the Islamic world which were never a part of British jurisdiction and the immensity of the task of searching literary or general works for reference to *kafā'ah* limit the number of recoverable instances. One such instance goes back to the middle of the second century of the hegira when a certain Abu Khuzāmah, who was a *qāḍi* in Egypt (144–154 A.H.), refused to set aside a marriage for lack of *kafā'ah* because the guardian had consented to the marriage. The chronicler seems to have mentioned the case only because it had become a *cause célèbre* due to the fact that the emir (governor) did not like the decision and set aside the marriage himself.[70]

In modern times the case of Ṣafīyah, the daughter of al-Sayyid Aḥmad 'Abd al-Khāliq al-Sādāt, the Shaykh of the Ṣūfi order known as al-Sādāt al-Wafā'īyah, attracted much attention. Ṣafīyah, in 1904, married Shaykh 'Ali Yūsuf, the owner and editor of *al-Mu'ayyad* newspaper. For the purpose of the marriage she appointed an outsider as her guardian. Her father, who was her legal guardian for purposes of marriage, brought suit in the Sharī'ah Courts asking for dissolution of the marriage because of lack of *kafā'ah*.[71] This action caused an uproar in Egypt especially because it was understood that the Egyptian government and the British High Commissioner were interested in sustaining the marriage. The courts ordered the dissolution of the marriage, but the government procrastinated in its enforcement. Finally the *Qaḍi al-Quḍāh* threatened to suspend all *sharī'ah* jurisdiction unless the order was enforced, whereupon the government placated him by obtaining a separation by mutual consent.[72]

The 'Alawīs of Ḥaḍramawt take an extreme view of *kafā'ah* and regard the marriage of an 'Alawī girl to a non-'Alawī as an insult to every descendent of the Prophet.[73] This attitude was evident in a case which evoked a lot of controversy among the 'Alawī community in Singapore

[70] Kindi, Kitāb al-Wulāh wa-Kitāb al-Quḍāh, (ed. R. Guest. London, 1912) 367.

[71] He alleged that the bridegroom was not the equal of his daughter in lineage and that the bridegroom's profession, journalism, was not an honorable one. See 'Abduh, I, Tatawwur al-Ṣiḥāfah al-Misrīyah (Cairo, 1951) 164.

[72] Al-Manār, Vol. VII (1904) 720. For a discussion of the doctrine of *kafā'ah* in relation to this case see *ibid.*, pp. 381–384. Muḥammad 'Abduh approved the comments of Al-Manār in Vol. VIII (1905), p. 581.

[73] Anderson, J. N. D., Islamic Law in Africa (London, 1954) 23.

in 1905.[74] An 'Alawī girl was married to an Indian Muslim whose pedigree was not certain. A brother of the girl and practically the whole 'Alawī community protested vigorously against the marriage. They secured a *fatwa* (legal opinion) from an 'Alawī jurisconsult saying that only a *sayyid* (descendent of the Prophet) can marry a *sayyidah* (female descendent of the Prophet) even though she and her *wali* (guardian) consent to such marriage, that the right to insist on *kafā'ah* is an innate right (*sharaf dhāti*) which, therefore, cannot be waived, and that the descendents of Ḥasan and Ḥusayn can insist on the fulfilment of *kafā'ah* in all marriages involving 'Alawi girls.[75] What became of the marriage is not recorded, but this extreme view of *kafā'ah* is not shared by other Muslims.[76]

Provisions for *kafā'ah* may be found in various codes and law books dealing with personal status.[77] But the force of the doctrine is waning. In Syria, "the usage which required that the husband be equal to his wife in birth and which prohibited *mésalliance* . . . is fading more and more, especially in the big cities, although it is still a part of the law."[78] Elsewhere the doctrine is not faring any better. In the territories of British rule or suzerainty the doctrine has been frowned upon. In *Fazlan Bibi v. Mahomed Din Kashmiri*, [1921], 8 K.L.R. 200, the Court of Appeal for Eastern Africa upheld the view that *kafā'ah* in marriage was now obsolete in Uganda.[79] The *kafā'ah* rules in Somaliland are ignored both by custom and by the courts.[80] The Chief Justice of Zanzibar has held that the rule which prohibits an Arab woman from ever marrying a non-Arab except with the agreement of her marriage guardian cannot be upheld in every case in Zanzibar today.[81] In Gambia, where the Wolof tribe regards goldsmiths, leather workers, minstrels, and "slaves" as castes into which a girl must never marry,[82] the question seems to be

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[74] For the various views on this case, see Al-Manār, Vol. VIII (1905) 215–217, 580–588, and 955–957.

[75] *Ibid.*, 582.

[76] *Ibid.*, 584.

[77] See for example Young, G., 2 Corps de Droit Ottoman (Oxford, 1905) 219; Kadri, M., Code of Mohammedan Personal law, tr. by Sterry, W. and Abcarius, N. (London, 1914), ss. 62–69; The Ottoman Law of Family Rights (1917), ss. 45–50; Ali, Ameer, Mahommedan Law (Calcutta, 1929), 364–369; Tyabji, F. B., Muhammadan Law (Bombay, 1940), s. 79; Fyzee, Asaf A. A., Outlines of Muhammadan Law (London, 1955) 91–93; and The Jordanian Law of Family Rights (1951), ss. 23–27.

[78] Daghestani, K., La Famille Musulmane Contemporaine en Syrie (Paris, 1932) 17.

[79] Quoted in Anderson, *op. cit.*, p. 105.

[80] *Ibid.*, p. 47.

[81] *Ibid.*, p. 72.

[82] *Ibid.*, p. 240.

a social, rather than a legal, one. In a Punjab case, it was laid down that the disregard of the rules of equality does not render the marriage void *ab initio*, and it was further said that the [lower] court was not justified in dissolving the marriage.[83]

In general, it would seem that the doctrine of *kafā'ah*, has ceased to be of major importance in determining or reflecting social stratification in Muslim society. This does not mean, of course, that social stratification is nonexistent or that it is on its way out. All it means is that a field once regulated by legal rules—because of the all-inclusive character of the law at the time—has gradually come to be governed by social rules and considerations.

[83] Jamait Ali Shah v. Mir Muhammad [1916] Punjab Record 371, as quoted in Fyzee, *op. cit.*, p. 92.

Comments

INTERNATIONAL ASSOCIATION OF LEGAL SCIENCE

THE COLLOQUIA AT CHICAGO, SEPTEMBER 8-16, 1957

I. THE RULE OF LAW AS UNDERSTOOD IN THE WEST

At Chicago, in the second and third weeks of September, 1957, the International Association of Legal Science, and the International Committee of Comparative Law which constitutes the executive committee of the Association, convened in their first conference to be held in the United States. The American Foreign Law Association, which is the United States National Committee of the International Association, and the University of Chicago were the hosts; and the Ford Foundation gave financial support. The conference was organized in three colloquia, on The Rule of Law as Understood in the West, The Rule of Law in Oriental Countries, and Legal Devices to Promote and Protect the Stability of Marriages.

In the colloquium on The Rule of Law as Understood in the West, the 'West' was taken in a sense which contrasted it not only with Asia, but also and more particularly with the Soviet Communist sphere. It is contemplated that another colloquium intended to be complementary to the Chicago Colloquium on The Rule of Law as Understood in the West will be held in Eastern Europe in 1958, to examine relevant aspects of legal doctrine and practice in Soviet Communist countries. Joint consideration of both sets of questions, in the light of the proceedings at the two colloquia, may be undertaken at a later meeting.

The inquiry began from several different points of entry into the subject matter. Certain of these points of entry were geographical, in the sense that they consisted of introductory expositions of French, German, Austrian, Italian, Swedish, Turkish, English, and American views of the supremacy of law. Other points of entry consisted of particular sets of questions. Notable among these were the implications for the rule of law of the complex of governmental arrangements, varying in style and content from country to country, often lumped together under the rubric, 'welfare state'; and the related but narrower question of administrative discretion.

In the discussion, several different levels or ranges of conception of the rule of law emerged. Each range of conception received significant support. In the widest, the rule of law was understood to embrace a sense of the worth of the individual, the dignity of man, essential human rights; a belief that the power of government must be contained within limits; a sense of law as a pervasive entity with a meaning and validity of its own apart from its relation to the organization of the state, upon which a man may depend to govern his relations with other men and with the state; an outlook or attitude, deeply ingrained in the population or in important sectors of the population, in which these several

elements are taken to be fundamentally interrelated; and a set of arrangements or processes or institutions which make these elements effective in the ordinary processes of daily life. Within this concept, stress was also laid upon the need to keep open the effective possibility of change to reflect general shifts in outlook or values; and upon the need for a widespread diffusion of power throughout the society, with a correlative prevention of concentration of power whether in private or governmental hands. In a second range of conception of the rule of law, closely akin to the first but not quite so comprehensive, emphasis was placed upon a substantive element, in the nature of human rights or a bill of rights; a procedural element, understood broadly to embrace the principle that the government may not interfere with the citizen except in accordance with a general law previously in effect, and the principle that the government may not apply force or sanctions against the citizen even for violation of such a general law except in accordance with a fair and orderly precedure; and an institutional element, in the sense of institutions through which the substantive and procedural factors can be vindicated. Another and narrower range of conception sought to concentrate attention upon institutions deemed essential. While recognizing the importance of the values intrinsic in these institutions, the participants in this view believed it necessary or at least wiser to confine the concept of the rule of law to the institutions themselves. Another and still narrower range of conception contemplated primary or exclusive emphasis upon a particular group of institutions: an independent judiciary and judicial review of executive (or legislative) action.

Toward the close of the seventh session, the inquiry turned to a consideration of the nature of the report which the General Reporter might undertake. It was understood that no attempt would be made to formulate a precise consensus to which all of the participants might explicitly subscribe; nor would the report be confined to an effort to identify the lowest common denominators which might be derived from the views and shades of emphasis which had been expressed. In preliminary and tentative terms, the General Reporter briefly suggested certain main lines which his report might follow, with due regard to the varying elements which had received significant attention in the course of the colloquium. At the eighth and final session, there appeared to be a common understanding that the General Reporter might appropriately proceed in accordance with this projection.

Upwards of fifty scholars, judges, and lawyers from Europe, North America, South America, and Australia took part as members of the colloquium. Observers from the Soviet Union, and Asian scholars in Chicago primarily to attend the colloquium on The Rule of Law in Oriental Countries also were present and contributed comments.

C. J. Hamson, of Trinity College, Cambridge, is the General Reporter. Milton Katz, of the Harvard Law School, served as Chairman.

MILTON KATZ*

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II. The Rule of Law in Oriental Countries

The colloquium on the Rule of Law in Oriental Countries followed immediately the discussions concerned with the Rule of Law in the West, and brought scholars from the Islamic states, Turkey, India, China, and Japan together with American and European scholars, including many of those who had participated in the preceding discussions. The summary which follows is based on the résumé delivered orally by the undersigned, as chairman, at the end of the colloquium.

It was noted that the two colloquia devoted to the rule of law had debated the definitional aspects of the term, some even questioning whether definition was desirable since the term is not incorporated in a legal document calling for interpretation. Yet, others sensed that the term had come to have some moral connotation, and may also have educational value. Therefore, the importance of definition should not be deprecated by colloquium members most of whom are educators as well as lawyers.

Toward the definitional goal thus fixed, the colloquium made substantial progress. It was discovered that scholars of various countries had misunderstood each other in the past; the reasons for the misunderstanding were identified, namely that in some parts of the world, there is a definition under Dicey's influence in procedural terms, while others, referred to as "the American idealists," read into the concept certain substantive rights, in addition to procedural regularity. In the future those who use the term must say in which sense they use it.

In turning to the Orient, the question arises as to the sense in which the term is used there. It seems from the discussion that if the debate between Dicey and the American idealists came before an Oriental court, the Japanese judges would lean toward the United States' view, while the Indians, having been brought up in the Dicey tradition, find it more difficult to discard the procedural definition. Indian court decisions, however, have indicated that they are moving toward the United States' view. Even in the United States, "due process" is not an absolute concept, and it is reasonable to ask whether the United States Supreme Court, if it were sitting in India, would have reached decisions different from those of the Indian Supreme Court, given the staggering economic problems of India and the convulsions and violence which accompanied the very birth of that nation.

In seeking a definition, one comes further to the question whether the term rule of law can be applied properly to a dependent country. In the procedural sense, it would seem that the answer could be in the affirmative; but in the substantive sense, those holding the United States' view would require the existence of a government established with the consent of the governed.

The discussions in both colloquia on the rule of law proceeded in terms of a distinction between institutions and values. In the Oriental colloquium, added difficulties had to be faced, arising not only from the hugeness of the geographical area with which the colloquium had to deal, but even more from the fact

that two sets of values and of institutions had to be considered: the old and the new, the indigenous and the imported.

In examining the old values, it became apparent that they were more perennial than institutions. It was said that in the sense of traditional values "a great system of law never dies." The older institutions, however, have receded. Their rigidity often prevented their adaptation to changed conditions, and Western institutions were drawn upon to fill the breach, partly because of the Orient's admiration of the technological and material "success" of the West. Western institutions thus came to be adopted and imitated in the Orient, sometimes voluntarily and sometimes as the result of compulsion; but whichever way Westernization was brought about, the result was the same so far as the older institutions were concerned: they vanished or were greatly impaired, and their place was taken by new Western-style constitutions, courts and codes.

Turning to the new institutions, they may reflect either common-law or civil-law influence, or varying mixtures of both, yet the crucial question raised is always the same: do these legal institutions embodying the rule of law as understood in the West make a significant and beneficial contribution toward solving the problems of Oriental countries? The fact that the legal machinery is Western, while some of the values may remain traditional and the problems to be solved may have no counterpart in Western experience, might at first blush be thought to create a contradiction; but this need not be so, for institutions can be assimilated, as has been evidenced in Turkey. Also, to the extent that Western institutions are democratic, they embody within themselves the possibility of growth and adaptation. Comparative lawyers can aid in the process of adaptation, as was evidenced two years ago in the colloquium on reception of Western law in Turkey. There, the scholars found certain difficulties in adapting Western marriage laws to Turkish conditions, and in the light of their findings it may not be too difficult to make the imported legal institutions more responsive to the needs of the recipient country.

The point was raised in connection with the problems of the Middle East that the assimilation of institutions is easier in private law than in public law; but that statement does not seem to be borne out by the experience in India and Japan.

There is an additional reason, connected with the nature of the values themselves, why there is no necessary contradiction between indigenous values and imported institutions. The values which inspired the institutions in the society of their origin, and the relevant indigenous values of the importing countries, may well be similar. Values, moreover, are not immutable. They change less swiftly than institutions, but change they do. The impulses which bring about such change in an Oriental country may be partly indigenous, partly Western, and partly perhaps due to the independent development of the imported Western institutions themselves. In changing, Western and Oriental values dramatically converge. The concept of the welfare state, strongly accented in both colloquia, is causing such convergence. India is determined to establish a welfare state,

but equally determined to preserve individual rights. The values behind this determination are not essentially different from those which today underlie the rule of law in the West.

Even where values differ, intercultural comparison of legal rules and principles may yield significant results. The borderline between institutions and values is not drawn with the edge of a knife. The legal profession, in particular, while being part of an institution, may perpetuate and generate values of its own. Therefore, and perhaps quite apart from the ultimate values motivating a society as a whole, it becomes a matter of moment if we can find, in legal rules and principles, common denominators linking Western and Oriental countries. Common denominators abound when we talk of law, and especially of those doctrines which constitute the essence of the rule of law, such as: separation or diffusion of power; fundamental rights, both human and civil; subjection to the law of all persons, including those at the political summit; legality and judicial review of administrative acts; fair trial, i.e. fair and objective procedure both in the courts and in the administrative process; an independent judiciary brought up in a tradition of impartiality and objectivity; and judicial or traditional restraints on arbitrary action by a parliamentary majority. These basic elements of the rule of law are common to the Orient and the West.

Some conclusions arise from the discussion which may be of professional interest to lawyers. First, lawyers are more competent in discussion of institutions than of values. In his own habitat, a lawyer is intuitively familiar with the values behind the legal institutions. When he deals with foreign cultures, however, these values may elude him unless he has the assistance of those who have the requisite knowledge and experience. Meetings of the character of the colloquium aid in this process of consultation and mutual education.

Further, it was found in the colloquium that professional lawyers both from the Orient and from the West speak the language of the civil and common law, so that channels of communication are open. If there are any intellectual or terminological barriers, they do not exist between West and Orient, but rather between various groups of Westerners, i.e., between civil and common law, and between the followers of Dicey and the believers in substantive fundamental rights. The great value of open and well-functioning channels of communication between lawyers of the West and of the Orient was proven by the smooth and responsive flow of arguments and by the absence of misunderstandings in the course of the colloquium itself.

Finally, it was found that not only in terminology, theory, and concept, but also in the actual contents of the legal principles relevant to "the rule of law," there was a considerable core of agreement between West and Orient. Some of the specific institutions and precepts which are included in this common core, have been mentioned above. The discussions thus gave support to the idea that there are general principles of law recognized by civilized nations and that these principles can be found by comparative study.

Dr. Saba Habachy of Egypt presided throughout the colloquium, except

during the discussion of law in Islamic states, when the chair was taken by Professor John C. H. Wu.

Professors Rudolf B. Schlesinger and John N. Hazard, both of the United States, acted as Chairman and Secretary, respectively, of the colloquium.

RUDOLF B. SCHLESINGER*

* Board of Editors.

III. Legal Devices to Promote and Protect the Stability of Marriages

The discussions of Legal Devices to Protect and Promote the Stability of Marriages, which had been carried on in September 1956 at the meetings of Santiago de Compostela and Barcelona, were continued in Chicago from September 9th to 18th. In accordance with the resolution adopted at Barcelona, social scientists and psychiatrists were invited to join in the discussions of 1957. At the meeting of 1956, the concepts of marriage stability and its counterpart, marriage breakdown, had been found to be complex and difficult to define. In order to have a working basis, it was decided to define as marriage breakdown the case of factual separation of husband and wife which takes place because of dissension. Devices to protect and promote marriage stability were consequently defined to be devices aimed at the prevention of factual separation or abandonment. The discussion of the problem to what extent, if any, laws rendering divorce impossible or difficult constitute effective devices to prevent factual marriage breakdown in the sense of separation or abandonment resulted in the conclusion that the existing state of knowledge does not allow any clear answer and that it would thus be desirable that inquiries were to be undertaken in the methods of exact empirical fact research.

The 1957 meeting was opened with a report on two such research projects. A statistical study was undertaken by Professor Ernst Wolf of the University of Marburg, Germany, with the assistance of Dr. Baumert, Mr. Lüke, and Mr. Hax, to find out in what ways if any the divorce rate of Germany had been influenced by the changes in the German divorce laws which had occurred in 1900 and 1938. The figures indicate that the law-givers of 1900 did not reach their avowed aim of stemming the rising trend of the divorce rate, nor that the facilitation of divorce which was brought by the law of 1939 had resulted in a perceptible rise. The statistical material available does not allow conclusions as to the problem of whether or not the rise of the divorce rate which took place between 1883 and 1953 has resulted in any corresponding decrease of the incidence of factual separations and abandonments not followed by a decree of divorce, and in the related incidence of unions of irregular concubinage not constituting legal marriages. On an investigation to find out the number of factually broken marriages in the Italian-speaking districts of Switzerland and the district of Italy adjacent to the Swiss border, a preliminary report was presented to the round table. Since the population on both sides of the border is

similar, while the divorce laws differ widely, it is hoped that the figures to be obtained may allow conclusions on the cause and effect relationship which may exist between divorce laws on the one hand and actual marriage stability on the other.

The discussion then turned to the possibility of influencing marriage stability through educational preparation for family living and counseling services for candidates for marriage and for people finding themselves in marital difficulties. The reported experiences resulted in the conclusion that these ways appear to be the most promising ones. Extensive discussion ensued on whether it would be more desirable to have marriage counseling carried on within the framework of a "family court" exercising general jurisdiction in family matters, or whether counseling should better be left to agencies and practitioners operating outside and independent of the machinery of the courts. Legislation designed primarily for purposes of population policy, such as the elaborate system of financial assistance provided for "large families" in France and Sweden, was also recognized to have had favorable results on marriage stability.

It was generally recognized that no methods of protecting and promoting marriage stability can reasonably be designed without fuller knowledge of the present state of facts and of the methods available. The round table thus devoted a considerable part of its time to the discussion of the statistical and other materials presently available and of the present state of knowledge and method in family sociology and psychiatry. While it was found that the existing body of such knowledge is considerable, it is not sufficient to allow intelligent planning for greater family stability. It was therefore decided that plans for establishing a well-designed scheme of further research should be discussed at a further meeting, which is scheduled to be held at Luxemburg in early August, 1958.

The Colloquium was attended by some 50 scholars and practitioners in law, sociology, social work, and psychiatry from Belgium, Czechoslovakia, Finland, France, Germany, Great Britain, Israel, Japan, Norway, Poland, Sweden, the Soviet Union, Switzerland, the United States, and Yugoslavia.

Professor Jean Limpens of Belgium served as Chairman, Professor Max Rheinstein as General Reporter.

On the day following the round table meeting on Family Stability, the presence in Chicago of family law experts from various parts of the world was used by the Government of Israel to call a meeting to obtain advice on several problems connected with the current plans of unifying and codifying the family law of Israel. This meeting, which was attended by twenty-two scholars, discussed primarily two problems, viz., how to achieve equality of the sexes in the personal relations between a husband and his wife, and how best to provide for the protection of a person's interest in privacy and other so-called interests of personality.

The meeting was chaired by Professor Joseph Dainow, Louisiana State University; Dr. Uri Yadin of the Ministry of Justice of Israel was General Reporter.

MAX RHEINSTEIN*

* Board of Editors.

CORPORATE DIRECTORS UNDER BRAZILIAN LAW

In spite of the strong influence of French law on Brazilian corporation law[1] both civil-law systems, American lawyers would encounter no difficulties in dealing with the various problems of corporate practice in Brazil. Despite differences in detail, the "general concepts" are fundamentally the same and produce similar results[2] especially in regard to management of corporations. The rules and concepts of Brazilian law on the legal position of directors, their authority and liability, are almost the same as those of American law.

Corporate Structure. Brazilian law[3] provides that corporations shall have three organs for the performance of corporate activities: the "general meeting" of stockholders, the board of directors, and the fiscal committee. The general meeting of stockholders is the supreme authority of the corporation[4] invested with the controlling power to control all the affairs of the corporation. Its authority includes election and removal of the directors, decisions in all matters connected with the management of corporate business, and determination of the advisability of measures for the protection of the corporation and the development of its activities[5]. The board of directors is the representative of

[1] In Brazil, since the enactment of the first general corporation law decree in January 10, 1849, the French designation *société anonyme* has been used for the term "corporation."

[2] Phanor Eder, "The Company Law in Latin America," 27 Notre Dame Lawyer (1951–52) 5 and 223.

[3] Decree-law 2627, of September 26, 1940.

[4] Trajano M. Valverde, 2 Sociedades por Ações (1953) 82.

[5] Decree-law 2627 of September 26, 1940, provides as follows:

"Art. 86. The general meeting is the assembly of shareholders, called and installed in the manner provided by the statute and the articles of incorporation, for the purpose of deliberating on matters of corporate interest.

"Art. 87. The general meeting has power to determine all affairs connected with the carrying out of the corporate business and to make such decisions as are deemed advisable for the protection of the corporation and the development of its activities.

"Single Paragraph. It is within the special capacity of the general meeting:

a) to appoint and discharge the members of the board of directors, of the Fiscal Committee or any other body set up by the articles of incorporation;

b) to receive, each year, the accounts rendered by the directors and consider the balance sheet presented by them;

c) to decide in regard to the creation and issue of "bearer bonds";

d) to suspend the exercise of the rights of a shareholder;

e) to alter or reform the articles of incorporation;

f) to consider the report on the valuation of property contributed by a shareholder in payment of shares;

g) to confer any privileges benefiting the incorporators, shareholders, or third parties and to authorize the creation of '*Partes Beneficiarias*' (negotiable securities without par value

the corporation. It exercises the powers of management and the executive functions. The extent of these powers and duties will be treated below. The fiscal committee (which must have at least three members and their alternates)[6] is the supervisory organ of the directors[7]. In it are vested the power to keep a check on management, especially with regard to financial matters and the duty to report periodically to the stockholders[8].

Board of Directors. Brazilian corporation law provides that every corporation shall be managed by one or more directors (*diretores*)[9], elected by a general meeting of stockholders for a term established by the articles of incorporation, which must not exceed six years.

The corporate management (*diretoria*)[10] is normally entrusted to several directors even though the law permits management of a corporation by one person[11]. The number of directors must be stated in the articles of incorporation[12]. In practice, it has been admitted that the articles may provide for a minimum and a maximum number of directors, leaving, however, to the general

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and separate from the capital, which confer upon their owners the privilege of an eventual claim against the company consisting of a participation in the annual net profit;
h) to decide upon the merger, consolidation, dissolution, and winding up of the corporation, and to appoint and discharge liquidators and examine their accounts;
i) to authorize the directors to admit the insolvency of the corporation and to make proposals for composition of creditors or creditors' meeting."

[6] Decree-law 2627, article 124.

[7] Trajano M. Valverde, *op. cit.* 333.

[8] Decree-law 2627 of September 26, 1940, article 127:

"It devolves upon the Fiscal Committee:
I. To examine, at any time, at least quarterly, the books and papers of the company, the state of cash and the safe, provided that the directors or liquidators shall give to them any information requested.
II. To draw up in the book of "Minutes and Reports of the Fiscal Committee" the result of the examination made in accordance with item I of this article.
III. To submit to the ordinary general meeting a report on the affairs and activities of the corporation during their term of office, taking as basis the inventory, balance sheet, and accounts of the board of directors.
IV. To report the mistakes, frauds or criminal acts of the managers which they may discover, suggesting such measures as they deem useful to the corporation.
V. To call the ordinary general meeting, should the board of directors delay doing so for longer than a month, and an extraordinary general meeting when serious and urgent reasons warrant the same.
VI. To perform, during the period of the company's liquidation, the acts referred to in the foregoing items, bearing in mind the special provisions governing liquidation."

[9] The word *diretor* in Brazilian law indicates a member of the management, a director in American law. It differs from French and Italian laws in which *directeur* and *direttore* designate a special and different position.

[10] *Diretoria* is the collective name for directors, having the meaning of board of directors.

[11] Waldemar M. Ferreira, 2 Tratado das Sociedades Mercantis (1952) 402; Tullio Ascarelli, Problemas das Sociedades Anónimas (1945) 492; Aloysio Lopes Pontes, Sociedades Anônimas (1942) 358. Corporations engaged in the mining business which have half or more of their capital represented in bearer shares and those which do business as banks of industrial credit must have a minimum of five directors; Decree-law 6230, of January 29, 1944, Article 2, and Decree-law 24575 of July 4, 1934, Article 13.

[12] Decree-law 2627 of September 26, 1940, Article 116, para. 1, "b".

meeting of stockholders the power to determine within these limits the number of directors who shall manage the corporation[13].

Qualifications for Directors. An unusual feature of Brazilian law is the requirement of special qualifications for corporate directors. It is not necessary for the corporate director to be a shareholder unless the articles so provide, but he must be a resident of Brazil[14]. Corporations engaged in the publication of newspapers and in radio and television transmission can only be managed by Brazilian-born citizens[15]. Brazilian citizenship is also required of the directors of corporations engaged in such activities as insurance[16], air transportation[17], airports[18], power plants[19], fisheries[20], oil refining[21], and brokerage in government bonds[22].

Conviction for certain criminal offenses precludes nomination to directorship. Moreover, the following occupations are incompatible with corporate directorship of individuals actually engaged therein: government officials[23], official brokers[24], and auctioneers[25]. Ineligible, further, are those who have been precluded, even if temporarily, by a former conviction from occupying public office[26], or who have been convicted of perjury, criminal or fraudulent bankruptcy, bribery, subornation, embezzlement, or any crime against *property*, *public reliance*, or *national economy*. The latter grounds of ineligibility are permanent, even in cases where the conviction has lost its efficacy[27].

Director's Bond. Even though it is not necessary that a director be an actual shareholder, it is required in every case that he deposit a bond in the form of

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[13] Tullio Ascarelli, *op. cit.* 492, Trajano M. Valverde, *op. cit.* 270 *et seq.*

[14] Trajano M. Valverde, *op. cit.* 362.

[15] Brazilian Constitution, Article 160; Trajano M. Valverde, *op. cit.* 282; Aloysio L. Pontes, *op. cit.* 362; Decision of Rio de Janeiro Court of Appeals, 27 Revista de Jurisprudencia (April 8, 1935) 74.

[16] Decree-law 2063 of March 7, 1940, Article 9; Aloysio L. Pontes, *op. cit.* 363; Trajano M. Valverde, *op. cit.* 282.

[17] Decree 20914 of January 6, 1932, Articles 9, 19, 28, 38, and 42; Aloysio L. Pontes *op. cit* 363.

[18] Decree 20914 of January 6, 1932.

[19] Brazilian Constitution, Article 153, paragraph 1; Decree 24643 of July 10, 1934, Articles 139 and 195; Aloysio L. Pontes, *op. cit.* 213–215; Hahneman Guimarães, Pareceres da Consultoria Geral da Republica (1945) 273.

[20] Decree-law 794 of October 19, 1938, Article 5; Aloysio L. Pontes *op. cit.* 363.

[21] Decree-law 395 of April 29, 1935, Article 3; Decree-law 961 of December 17, 1938, Article 1.

[22] Decree-law 3545 of August 22, 1941, Article 2.

[23] Law 1711 of October 28, 1952, Article 195; Brazilian Constitution, Article 48; Commercial Code, Article 2; Decree-law 9696 of September 2, 1946, Article 30.

[24] Commercial Code, Article 60; Decree 2475 of March 13, 1897, Article 49; Decree 20881 of December 30, 1931, Article 39; Decree 19009 of November 27, 1929, Article 15.

[25] Decree 21981 of October 19, 1931, Article 35.

[26] Trajano M. Valverde, *op. cit.* 285; Aloysio L. Pontes, *op. cit.* 362.

[27] Supreme Court of Brazil, Decision of May 31, 1951, 99 Archivo Judiciario 287; Court of Appeals of São Paulo, Decision of January 23, 1951; 191 Revista dos Tribunais 726.

shares of the corporation and in the amount provided for by the articles of incorporation. This security is required for the benefit of the corporation, of the shareholders, and of all the creditors. When the director is not a shareholder, any shareholder may deposit the bond for him[28]. In addition to this bond in the form of shares, the articles may provide that a director shall give additional security. But usually the articles require only the bond in a small amount. This is to facilitate access to the board of directors[29].

The bond must be given before the director commences exercise of his duties. If the deposit is not made within thirty days from the date of the appointment of the director, it is presumed that he has declined the office[30]. But if the director assumes office without giving the bond, his acts are considered effective,[31] and any shareholder or creditor may enforce the obligation to deposit the bond[32].

Appointment, Substitution, and Removal of Directors. The authority to appoint and remove directors is vested exclusively in the general meeting.[33] The articles of incorporation must state any additional qualifications for the election of directors and the manner and method of their election by the general meeting, but only those chosen by the shareholders have the power to manage the corporation. This is true even in the case of absence, resignation, or death of a director. In this situation, the articles or the general meeting will usually provide for another director to take over his duties. If such provision has not been made, the practice of the courts has been to hold invalid the appointment of such substitute by the directors who had not been elected to the board by the shareholders[34]. Unlike American corporation law, the board of directors of a Brazilian corporation may not elect substitute members at any time.

The term of office of a director is to be determined by the articles of incorporation but may never exceed six years. The directors, however, are eligible for re-election. The appointment of a director, on the other hand, does not mean that he shall hold office for the term established in the articles, because the shareholders have the power to remove directors at any time. In this respect, Brazilian law assumes a position opposite to that of the common law. There is, in Brazilian law, an implied power in the shareholders to remove

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[28] Trajano M. Valverde, *op. cit.* 306; J. X. Carvalho Mendonça, 4 Tratado de Direito Comercial Brasileiro (1945) 46. Aloysio L. Pontes, *op. cit.* 367.

[29] Trajano M. Valverde, *op. cit.* 307.

[30] Trajano M. Valverde, *op. cit.* 308; Aloysio L. Pontes, *op. cit.* 369; J. X. Carvalho Mendonça, *op. cit.* 46.

[31] J. X. Carvalho Mendonça, *op. cit.* 47; Trajano M. Valverde, *op. cit.* 309; Spencer Vampré, Tratado de Direito Comercial (1922) 256; Aloysio L. Pontes, *op. cit.* 370; Decision of the Court of Itu, São Paulo, 60 Revista dos Tribunais (July 21, 1926) 208.

[32] Trajano M. Valverde, *op. cit.* 309.

[33] A corporation shall be managed by one or more directors resident in the country, whether shareholders or not, *and chosen by a general meeting, which may at any time remove them.* Corporation Law, Article 116. (emphasis added).

[34] São Paulo Court of Appeals, decision of August 3, 1950, 189 Revista dos Tribunais 462.

directors, before the expiration of their specified term, without cause. Under this doctrine, from which the articles of incorporation can in no way deviate, the directors may be removed at any time by the vote of a simple majority of the shareholders[35]. Hence, a charter provision providing for the removal of directors for specific reasons only, is not effective[36]. Regardless of any provision in the articles, only the shareholders have authority to remove the directors from office during their term. This is true even in cases when the removal of a director may be essential to the protection of the interest of the shareholders.

The authority of the shareholders to remove directors for cause is an important safeguard. However, the power to remove at will, without cause, tends to weaken the management and places the directors under the complete control of the majority of the stockholders and makes interference, with the threat of removal, in the management of the corporation possible at any time. Under Brazilian law, a director, however conscientious in his management of corporation affairs may not recover damages for an unjustified removal[37].

The practice of the courts, being without power to do so, is not to interfere in the removal of directors, although they may threaten the company with financial ruin[38]. Legislative policy, on the other hand, regards the shareholders as the highest authority within the corporation, vested with the exclusive power of evaluating the competence of the directors and of appointing those individuals who are to manage the corporate affairs.

A director may resign before the expiration of his term. In such cases, he may designate the person previously elected by the shareholders as his substitute or alternate.

Authority of Directors. Under Brazilian law, the corporation is a juridical person. It can act only through a representative body, which derives its authority from statutory regulations. This is the board of directors. Consequently, the directors are representatives of the corporation and not of the shareholders. The authority of an individual director is inferred from the global authorization granted by statute to the entire body of the board of directors.

The rationale of this theory is the corporate structure provided for by the statute. The shareholders are the masters of the corporation, yet they have no authority to act in its name. Such authority is vested exclusively in the directors; the individual shareholder, as such, has no power either to represent

[35] São Paulo Court of Appeals, Decisions of September 18, 1939, 81 Revista Forense 418; and March 27, 1952, 201 Revista dos Tribunais 209; Trajano M. Valverde, *op. cit.* 303; J. X. Carvalho Mendonça, *op. cit.* 51; Aloysio L. Pontes, *op. cit.* 378; Spencer Vampré, *op. cit.* 290.

[36] Trajano M. Valverde, *op. cit.* 303.

[37] São Paulo Court of Appeals, Decision of September 18, 1939, 124 Revista dos Tribunais 576; and March 27, 1952, 201 Revista dos Tribunais 209; J. X. Carvalho Mendonça, *op. cit.* 52; Aloysio L. Pontes, *op. cit.* 378; Spencer Vampré, *op. cit.* 291; Waldemar M. Ferreira, *op. cit.* 442; Salvador Muniz, Sociedades Anônimas (1914) 255.

[38] Rio de Janeiro Court of Appeals, Decision of September 16, 1909, 16 Revista de Direito 259; J. X. Carvalho Mendonça, *op. cit.* 52; Aloysio L. Pontes, *op. cit.* 379.

the corporation or to interfere with its management except through his vote in the general meeting[39].

The authority entrusted to the directors is exclusive. The statute does not authorize a corporation to confer the management upon any other groups.

Legal Position of Directors. The directors are sometimes inaccurately described as agents, because of their power to act in the name of the corporation and to bind the corporation by their acts[40]. In this respect, they are subject to the same principles as those applicable to agents, but this is only a consequence of the fact that "management" and "agency" have many similarities.[41]

The directors, however, are not agents either of the shareholder or of the corporation. Their position is that of representatives, not that of agents. This was expressly confirmed by the Rio de Janeiro Court of Appeals *in re Alvaro Aquino Sales v. Cia. Simoes S.A.* as follows:

> "The Decree-law 2.627, of September 26, 1940 which governs corporations, in Articles 116 and the following, gives the true legal position of the directors of corporations, indicating that they do not perform the functions of agents but exercise the powers of management as directors."[42]

The directors also have been classified as fiduciaries, in a position similar to that of the trustee in the common law, because they are to manage the corporate affairs only for the benefit of the corporation, its shareholders, and creditors[43]. Consequently, they are subjected to certain rules which are similar to those of the law of trusts[44]; nevertheless, they are not mere fiduciaries.

Thus, the legal position of directors under Brazilian law is similar to the prevailing concept in the common law. They are not agents or fiduciaries, for they constitute a different, unique class partaking of the nature of both[45].

Individual Authority of Directors. In this respect also, Brazilian law assumes a completely different position than the general approach of Anglo-American law. In spite of the fact that the management of the corporation is conferred upon the board of directors, its members are not bound to act as a unit unless the articles of incorporation so provide[46]. The authority is vested in the directors individually and not as a board. As a general rule, they can act individually within the scope of the powers conferred by the articles, and their acts will be an act of the corporation. Unless the articles provide otherwise, all the directors have equal powers in all matters within the authority of the board and the

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[39] Decision São Paulo Court of Appeals, 1 Gazeta Juridica (1893) 497.

[40] Trajano M. Valverde, *op. cit.* 277; Aloysio L. Pontes, *op. cit.* 356; Waldemar F. Ferreira, *op. cit.* 403.

[41] J. X. Carvalho Mendonça, *op. cit.* 40; Aloysio L. Pontes, *op. cit.* 356; Trajano M. Valverde, *op. cit.* 277; Bento de Faria, Sociedades Comerciais (1948) 719.

[42] Decision of April 9, 1943, 17 Jurisprudencia do Tribunal de Apelação 48, at 49.

[43] J. X. Carvalho Mendonça, *op. cit.* 39.

[44] The trust as such is unknown in Brazilian law.

[45] Stevens on Corporations (1949) 647; Trajano M. Valverde, *op. cit.* 277.

[46] Trajano M. Valverde, *op. cit.* 291.

individual action of any one will bind the corporation[47]. When the articles provide that each director must have special powers, a director has authority to act individually in the matter in question when specially empowered to do so.

Under this statutory scheme, every director possesses individual authority to act separately, within the powers conferred upon him by the articles, in all matters of business. The Rio de Janeiro Court *in re Antonio Ribeiro Seabra*, decided in April 10, 1933, that within the powers conferred by the articles upon each director, they are free to act without the necessity of a meeting of the board or consultation with the other directors. This decision states that "each director is an organ of the corporation, with separate capacity to exercise the powers conferred upon him"[48].

The statute proceeds upon the theory that the position of every director is similar and that they have equal powers to manage the corporation[49]. Acting individually and separately, without any decision of the board, their action is that of the corporation. The reason behind such a rule is the general provision of the Brazilian Civil Code, which states:

"Article 1384. When the management is vested in two or more members, without discrimination as to their functions, or declaring that they shall act jointly, each one may, by himself, perform all acts pertaining to the management."

The articles of most Brazilian corporations do not require the action of the directors as a board except for unusual matters. The typical system is a division of powers among the directors. The articles confer upon each director powers for special matters[50]. It is also quite normal for the articles to provide that two directors shall act jointly in the performance of certain acts, such as the signing of contracts, bills of credit, and the like. The division of authority among the directors is effective only when stated in the articles of incorporation. Neither the general meeting nor the board of directors have the power to establish a division of powers among the directors[51].

The rule of the statute that each director has authority to act in the name of the corporation has severe limitations. When the articles provide that the directors shall conduct business, acting as a board, they cannot do so separately. In such instances, as in Anglo-American law, the corporation cannot act except by the majority vote of the board of directors in a meeting, duly convened according to the articles, at which the directors have the opportunity of consultation and deliberation. If there is such a provision in the articles and a director acts in his individual capacity, his action is not that of the corporation and will not, therefore, bind it.

[47] Trajano M. Valverde, *op. cit.* 294; Aloysio L. Pontes, *op. cit.* 403; Waldemar M. Ferreira, *op. cit.* 406.

[48] Oliveira e Silva, Tratado das Sociedades Comerciáis (1942) 151.

[49] Aloysio L. Pontes, *op. cit.* 403.

[50] Trajano M. Valverde, *op. cit.* 292.

[51] Aloysio L. Pontes, *op. cit.* 403.

Powers of Directors. The rule stated in the statute is that every one of the directors possesses such specific powers as are delegated to him by the articles and, in the absence of any provision to the contrary in the articles, all powers necessary for the management of the regular business affairs of the corporation and not specifically delegated to another director.[52] The implied authority so delegated is restricted to all matters relating to the ordinary business transactions of the corporation. Beyond such transactions, the directors have no power to bind the corporation, unless the articles expressly confer such authority.

Consequently, under this provision, the authority of the directors includes powers which in American law are vested not only in the board of directors but also in the officers. They have the power to formulate policy and the additional power to execute this policy. However, the policy-making power is subject to the control of the stockholders, who, through the general meeting, may assume complete control over this function. Although this residual power does exist in the stockholders, it is seldom exercised. On the other hand, the executive power is vested exclusively in the board of directors and is thereby free from interference by the stockholders. As in American law, the shareholders have no standing to interfere in such actions of the directors as relate to the ordinary business of the corporation.

As has already been pointed out, the articles must state the extension of specific powers conferred upon every director. In the absence of such a provision, they have only the power to represent the corporation and to perform those acts of management which relate to the regular business affairs of the corporation. Such "are the only acts included in the normal operation of the corporation," as held by the Brazilian Supreme Court[53]. Thus, in the absence of any provision in the articles, a director has the authority to receive credits, pay debts, sell personal property which is unnecessary or unfit for corporate use, sell personal and real property of the corporation in case this is one of the corporate objectives or purposes, borrow money necessary for the normal business of the corporation, appoint employees, agents, and attorneys, make contracts within the objectives of the corporation, declare dividends, and propose to the general meeting the amount thereof or the manner in which the net profits shall be distributed when the articles do not specifically provide therefor, and perform any act necessary to carry on the regular business affairs of the corporation. Their authority does not extend to fundamental changes in the corporation organization[54]. Even activities such as the mortgage, pledge,

[52] Corporation Law, Article 115, paragraph 1. "The articles of incorporation shall state: . . . (e) the functions delegated to each director and the powers vested in him.

Paragraph 2. Unless the articles of incorporation otherwise provide, there devolves upon any and each of the directors the active and passive representation of the corporation and the performance of any act necessary for the normal operation of the corporation."

[53] Decision of October 28, 1947, Diario de Justiça, August 12, 1949, p. 2137.

[54] Decision of Court of Appeals of Rio de Janeiro of December 17, 1914, 2 Revista Juridica 322.

or transfer of personal and real property of the corporation, if they do not fall within any of the corporate purposes, must receive the previous consent of the general meeting of the shareholders, unless the articles expressly confer such power upon the board or one of its members[55].

The general rule that the directors possess such powers as are delegated to them by the articles, has certain exceptions. Regardless of any provision in the by-laws, the directors have no authority to:

(a) change the organization or character of the corporation;

(b) perform acts of liberality at the expense of the company which will decrease the corporate assets or will not bring any benefit or advantage to the corporation. In the case *Celso Monteiro v. Refinadora Paulista*, in which the plaintiff brought an action to enforce a contract for the sale of real property of the corporation, concluded by the directors at a price very much inferior to the real value, the Court of Appeals of São Paulo held the contract unenforceable on the grounds that it was an act of liberality and that such acts of the directors do not bind the corporation. Contributions for the aid of employees regarding pension plans, medical care, and social aid, as well as the distribution of a bonus to the directors and employees in a fair amount, are not considered acts of liberality;

(c) borrow money from the corporation without the previous consent of the shareholders given in a general meeting;

(d) appoint or discharge a member of the board, of the fiscal committee or of any other body set up by the articles;

(e) create preferred shares or change the preferences or privileges conferred upon one or more classes thereof, or create a new and more favored class of preferred stock;

(f) create and issue bearer bonds and founders' shares;

(g) grant privileges to the founders, shareholders or outsiders;

(h) alter or amend the articles;

(i) make a change in an essential purpose of the corporation;

(j) vote for the merger, consolidation, liquidation or winding up of the corporation;

(k) suspend any rights of the shareholders;

(l) approve the report of the valuation of any property given in payment for shares;

(m) appoint or discharge liquidators;

(n) admit the insolvency of the company or make proposals for a composition with creditors or the creditors' meeting (to prevent or suspend the liquidation);

(o) terminate the process of liquidation, once begun, by restoring the company to normal operation; or

(p) increase or decrease the share capital.

[55] Decision of São Paulo Court of Appeals of Febr. 13, 1935, 94 Revista dos Tribunais 475.

Power of Shareholders to Control the Acts of the Directors. Unlike the general approach of Anglo-American law, the shareholders of a Brazilian corporation have broad control over the directors. Complete power of control of the business is not concentrated in the board of directors. They are in the position of servants to whom orders may be issued by the majority of shareholders, as the statute confers upon the general meeting of the shareholders complete authority to decide all matters regarding the carrying on of the business as they may deem advisable for the protection of the company and development of its activities.

If the general meeting through a majority of the shareholders votes that a certain action be taken, this will control the directors' discretion, because they are bound to obey the decisions of the general meeting, unless its resolution is in violation of a provision of the articles.

Besides this direct control, the shareholders can limit the directors' discretion by imposing limitations upon any power which has not expressly been conferred in the articles of incorporation. Another relevant instrument for controlling the directors' discretion is the shareholders' right to remove them from office at any time without cause. Such broad powers of control over the directors may in some instances paralyze the board of directors and affect the efficiency of the management.

Delegation of Function by a Director. The general rule in Brazilian law is that the power of management and functions of a director may not be delegated.[56] The power of management belongs exclusively to the directors, and the delegation of such power to other persons is invalid[57].

However, within the limits of his authority, a director can appoint agents to perform specific acts in the name of the corporation and attorneys to sue or to defend the corporation. These, however, are agents of the corporation, not of the directors. In order to bind the corporation, the statute requires that each act to be performed by the agent be clearly specified in the power of attorney by which he is appointed.

Directors' Duties. The duties of directors are imposed by the statute and by the articles of incorporation. General duties are imposed by statute and bind all the directors; specific duties of particular directors are governed by the articles.

The duties imposed by statute may be classified into three categories. The first is the duty of obedience while exercising the functions of a director. These have been summarized as including (1) filing and publication in the "Official Gazette of the Union" of all documents relating to the incorporation and changes in the articles; (2) signing of certificates for shares and founders' shares; (3) registration and keeping of the corporate books, the register of shares and

[56] "The functions and powers, conferred by the statute on the directors, may not be delegated to any other group created by the statute or by the articles. Within the limits of their functions and powers, directors have the power to appoint, in the name of the corporation agents and attorneys, specifying in the deed the acts and operations that they may perform." Corp. Law, Article 116, paragraph 5.

[57] Trajano M. Valverde, *op. cit.* 300.

certain other items specified in the statute; (4) exhibition to the shareholders of all books of account of the corporation and furnishing to any person of copies of entries in the "nominal share" register; (5) supplying any information requested to the Fiscal Committee; (6) ascertainment of the profit or loss at the end of the financial year or twice yearly, if the corporation has issued bonds; (7) calling the regular general meeting of shareholders at the time provided for in the articles and the extraordinary general meeting of shareholders in cases provided for by statute and the articles of incorporation; (8) publication, at least five days prior to the date fixed for the general meeting, of the directors' report, balance sheet, profit and loss statement, and report of the Fiscal Committee; (9) reporting to the shareholders once a year of the actions taken by management; (10) publication of the minutes of the general meeting of the shareholders within 30 days after the meeting; (11) filing with the National Department of Statistics the directors' report, the balance sheet, profit and loss statement, and the report of the Fiscal Committee[58]; (12) and, in general, keeping within the powers conferred upon the board and the objectives and purposes of the corporation.

Standard of Diligence. Second is the duty of diligence. Directors owe to the corporation the duty to exercise their powers and functions with diligence and care. The rule in the statute provides that the directors are required to discharge the obligations of their office with such diligence and care as an active and honest man would ordinarily exercise in the management of his own business[59]. In the management of corporate business, a director shall give the same detailed attention, the same degree of care and effort that active men prompted by self-interest display in their own concerns.

Transactions Between Directors and Their Corporation. The third duty is the obligation to be loyal to the corporation. A director must manage the corporate affairs for the benefit of the corporation and the shareholders and may not derive from his position any advantage detrimental to the corporation and its shareholders. Here, however, Brazilian law is most liberal. A director not only may assume the responsibility of management in more than one corporation, but he can also compete with the corporation, exploiting personally, or through other business associations, the same business in which the corporation is engaged[60].

The same criteria of liberality prevail in the rules which govern contracts between directors and their corporation and transactions in which the director has a personal interest contrary to that of the corporation. Such transactions between directors and their corporation are not void. A director can borrow money from the corporation with the previous consent of the general meeting of shareholders[61], or buy directly from the corporation any product that the

[58] Trajano M. Valverde, *op. cit.* 295; Aloysio L. Pontes, *op. cit.* 388.
[59] Decree-law 2627, article 116, paragraph 7.
[60] Trajano M. Valverde, *op. cit.* 315.
[61] Trajano M. Valverde, *op. cit.* 313.

former manufactures or sells[62] or enter into any contract with the corporation in a matter in which he has personal interest[63].

The only requirement of the law is that the director shall make a disclosure of the facts to the other directors but shall not take part in the transaction on behalf of the corporation, neither acting as a representative of the corporation nor participating in the discussion of the matter by the board[64].

When there is a disclosure by the director of his conflicting interest and he does not act in behalf of the corporation, nor participate in the decision of the board, the contract is valid and binds the corporation, regardless whether it is fair or not. Such a contract is not subject to scrutiny by the courts under the "fairness test." The contract is valid even when corporate interests were not safeguarded by the other disinterested directors if their decision was free from the influence of the interested director and if the latter made a full disclosure of his interest.

The same concept governs contracts between business associations with common directors. In re *Antonio Ribeiro Seabra et al.*, the Rio de Janeiro Court held that it is lawful for a corporation and a partnership, of which two partners were also directors, to enter into a contract as long as these common members did not act on behalf of the corporation in the negotiations[65].

When a director does not disclose his interest and acts in behalf of the corporation in any matter between the latter and the director or any business association in which he has an interest, the contract is voidable. But even in such case, the director's act is valid if subsequently ratified by a resolution adopted by the stockholders in the general meeting[66].

Director's Transactions in Shares of His Own Corporation. The law does not establish any requirement for the purchase or sale of shares of a corporation by a director. He can purchase and sell corporate shares except those given in bond and is not obligated to disclose to the other party any information regarding the corporation which will affect the value of the shares.

When the purchase has been induced by a false representation or a concealment tantamount to false representation on the part of the director, the transaction is voidable. But if there is no such misrepresentation or concealment, a director has no duty to disclose to the shareholder or the prospective buyer facts or contemplated transactions which will affect the value of the shares and which the director knows by reason of his office.

Any profit made by a director through transactions in shares and as a consequence of his intimate knowledge of corporate affairs is not recoverable by the corporation or by the purchaser or seller.

Acts of Directors in Excess of Their Authority. Directors, like agents, are bound to observe the limits imposed upon their authority. The general rule

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[62] Aloysio L. Pontes, *op. cit.* 409; Trajano M. Valverde, *op. cit.* 316.
[63] Trajano M. Valverde, *op. cit.* 315; J. X. Carvalho Mendonça, 6 *op. cit.* 1203.
[64] Aloysio L. Pontes, *op. cit.* 408; Trajano M. Valverde, *op. cit.* 315.
[65] Oliveiro e Silva, Sociedades Anônimas (1944) 147.
[66] Aloysio L. Pontes, *op. cit.* 409.

is that the corporation is bound by the acts of the directors only when they act within the limits imposed upon them by statute, by the articles of incorporation, or the decision of the shareholders in the general meeting.[67]

The statement of the objectives or purposes of the corporation in the articles and the powers conferred upon the directors are the limits of their authorized acts. In Brazilian law, there is no specific rule for *ultra vires* acts. Transactions which are outside the objectives of the corporation are unauthorized because they are beyond the authority of the directors. A transaction foreign to the corporate purposes or objectives is outside the actual authority of the management. Implicit in the restrictions on the activities of directors is the legal consequence that the corporation is not bound by the acts of a director if the act or the transaction is foreign to corporate objectives or purposes, or transgresses the powers specifically delegated[68].

There are notable exceptions to this general rule. An unauthorized act of a director may bind the corporation if the latter has received the benefits of the transaction. The Rio de Janeiro Court of Appeals in *Sociedade Anonima Scarpa v. Massa Fallida da Companhia de Seguros Previsora Riograndense* held that "once the transaction was to the benefit to the corporation, it is liable for the obligation contracted in its name, even if the same was irregularly entered into by one of the directors".[69] Also, when the limitation upon the directors' authority is not provided for by statute, but is established by the vote of the shareholders in the general meeting, acts in excess of such authority may bind the corporation if the third party contracted with the director under the justifiable belief that his conduct was within his authority[70].

Ratification of Acts in Excess of Directors' Authority. The principles regarding the ratification of unauthorized acts are well settled in Brazilian law. The corporation by ratification may be bound by an unauthorized act of its director, but only when such act or transaction does not violate the statute or the articles of incorporation[71]. Such ratification must be given by the stockholders in the general meeting, either expressly or by inference. When the general meeting of stockholders has knowledge of the unauthorized act and does not repudiate it, the ratification is implicitly given and the corporation will be bound thereby[72].

[67] Decision of São Paulo Court of Appeals of Nov. 1, 1930, 75 Revista dos Tribunais 499; Res Comp. Cinematografica Brasileira, 94 Revista dos Tribunais 475; Rio de Janeiro Court of Appeals decision of June 30, 1931, 102 Revista de Direito 420; Trajano M. Valverde, *op. cit.* 299; Aloysio L. Pontes, *op. cit.* 411.

[68] Supreme Court of Brazil, decision of October 28, 1947, Diario de Justiça August 12, 1949; Rio de Janeiro Court of Appeals, decision of June 26, 1943, 16 Jurisprudencia do Tribunal de Apelação 72. São Paulo Court of Appeals, decision of November 1, 1930, 75 Revista dos Tribunais 499; Trajano M. Valverde, *op. cit.* 299.

[69] Decision of December 5, 1924, 78 Revista do Supremo Tribunal Federal 210.

[70] Rio de Janeiro Court of Appeals, decision of November 11, 1915, 1 Revista Juridica 148.

[71] Brazilian Supreme Court, decision of June 19, 1920, 62 Revista de Direito 94; São Paulo Court of Appeals, decision of October 25, 1935, 99 Revista dos Tribunais 152; Waldemar M. Ferreira, 2 Tratado dos Sociedades Mercantis (1952) 431.

[72] São Paulo Court of Appeals, decision of March 23, 1916, 22 Revista dos Tribunais 199; decision of May 20, 1919, 30 Revista dos Tribunais 27.

An illegal act of a director or a transaction that violates articles, for instance, an *ultra vires* transaction, may not be ratified[73]. If the shareholders ratify a transaction that is illegal or contrary to the provisions of the articles, the resolution is voidable and may be declared to be without effect at the request of any stockholder who was not present at the meeting or who voted against the ratification[74].

Directors' Liability. As representatives of the corporation, the directors are not personally liable in transacting the normal business of the corporation. Any such transaction entered into by a director, which is within the powers delegated to him and within the objects or purposes of the corporation, binds only the corporation.[75]

As between the director and the corporation, the director is not liable for losses due to honest errors of judgment. The Tribunal of Federal Appeals in *Companhia Quimica Merck, Brazil S. A. v. Bruno Max Manfred Rieckoff* held that "the hazards in acts or transactions within the realm of normal corporate affairs devolve upon the corporation" and that directors are not liable for losses caused to the corporation except when they are guilty of malfeasance or deceit, or when they act in excess of their delegated powers.[76]

If the director acts within the standards of reasonable diligence and care, he is not liable for acts within his authority. There is, however, an exception to this rule. The directors may be personally liable for any act or transaction that they perform in the corporate name prior to the filing and publication of the articles of incorporation unless such acts or transactions are ratified by the stockholders in the general meeting.

The directors are liable for:

(a) fraudulent mismanagement;

(b) culpable neglect;

(c) violations of the law and the provisions of the articles of incorporation.

The directors are personally liable to the corporation, the shareholders, and third parties for any losses caused by their fraudulent acts in carrying on the usual business of management. Thus, when the directors knowingly issue a false report or prospectus containing untrue statements of material facts,

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[73] Rio de Janeiro Court of Appeals, decision of June 30, 1931, 102 Revista de Direito 420.

[74] Supreme Court of Brazil, decision of May 16, 1938, 39, Section 5 Revista do Supremo Tribunal Federal 182.

[75] "Directors are not personally liable for obligations which they assume in the name of the corporation and in connection with the performance of the usual acts of management.

Paragraph 1. However, they are liable in damages for losses that may result when they act:

I. within their functions and powers, with fraud or deceit;

II. in violation of the law or the articles of incorporation. The directors are jointly liable for losses caused by their failure to fulfill the requirements and duties imposed by the statute which ensure the normal operation of the corporation, even though, according to the articles of incorporation, such duties should not devolve upon all the directors." (Corporation Law, Articles 121 and 122).

[76] Dicionario das Sociedades Anonimas (1950) 17.

with the intention to mislead the public and to induce it to purchase shares of the corporation or to have dealings with it, they are personally liable for the losses caused to individuals. The directors are always liable for the loss and damages that they cause when they act with malice[77].

On the other hand, when a director has failed to measure up to the standard of diligence, skill, and care required of him he is personally liable for the loss and damages caused thereby[78].

The loss due to the director's fraudulent maladministration or culpable neglect gives rise to a cause of action for the corporation, the stockholders, and such third parties as suffered loss. The burden of proof of the proximate cause of damage is placed upon the corporation or those who suffered damage[79]. They must establish that the loss and the damage was caused by the director's malice or that the harm could have been avoided had the director exercised due care and diligence.

Regarding losses resulting from the wrongful acts of employees or agents, Brazilian law takes the position that a director may be liable only if the loss is the result of his failure to use proper care in the selection of employees or agents, or is due to his failure to supervise their activities.

To render a director liable to the corporation, to the stockholders or creditors, on grounds of violation of the law or of the articles of incorporation, the director must have participated in the alleged act. Among such acts are those which exceed his authority or are foreign to the normal affairs of the corporation[80]. It is well settled that when a director exceeds his authority he is liable to the corporation for the losses and is personally bound to a third person who deals with him as a representative of the corporation[81]. The third person has the right to hold the director to the terms of the contract, even if the latter acted in the belief that his conduct was authorized.[82].

The corporation has two distinct causes of action against such a director. First, to recover damages for the losses caused by his act; second, to annul the act of malfeasance or that which exceeds the director's authority.

The directors are jointly liable for the damages caused to the corporation and to the creditors, but a director is not personally liable for the misconduct of other directors if he did not conspire with them and was unaware of any wrongdoing.

Conclusion. Brazilian law provides for a division of authority in order to give the corporation the best supervision and management. The position assumed by the statute is that the directors are organs of the corporation and

[77] Minas Gerais Court of Appeals, decision of May 20, 1926, 58 Revista dos Tribunais 269

[78] São Paulo Court of Appeals, decision of February 20, 1951, 192 Revista dos Tribunais 580.

[79] Rio de Janeiro Court of Appeals, decision of May 15, 1934, 31 Archivo Judiciario 583.

[80] Rio de Janeiro Court of Appeals, decision of July 12, 1917, 46 Revista de Direito 603.

[81] São Paulo Court of Appeals, decision of November 1, 1930, 75 Revista dos Tribunais 499; Rio de Janeiro Court of Appeals, decision of September 15, 1942, 16 Jurisprudencia Tribunal de Apelação 72.

[82] J. X. Carvalho Mendonça, *op. cit.* 78.

not the agents of the shareholders. This is in accordance with the trend of the most recent statutes[83] and insures the authority of the management.

But the statute unfortunately fails to observe the necessary separation between the powers of the shareowners and the powers of management. The broad control which the shareholders have over all matters relating to corporate affairs and over the directors by virtue of their policy-making power and the right of removal of directors without cause, weakens the management. Concentration of the power of control of the business is necessary for the efficient operation of the corporation. The directors are an instrument for the more effective conduct of the business enterprise and their power should not be curtailed by the strict control of the shareholders who are "too numerous, scattered and unfamiliar with the business of the corporation to conduct its business directly[84]."

Brazilian law would profit from a revision which would increase the authority of the directors. Complete control of the management of the corporation should be vested exclusively in the directors. The shareholders should have no authority to formulate business policies or to override the directors' discretion.

It would also be beneficial to increase the stability of management. The shareholders should have the power to remove directors at any time, *but only for cause*, as when the negligence or misconduct of a director indicates the need and propriety of his removal.

This necessary increase in the directors' authority must be accompanied by a correspondingly broader liability. A director should be responsible to the corporation not only for the losses caused, but also for any undue profit that he may derive from his office. A director who competes for business with the corporation should be held accountable to the corporation. More strict rules regarding the director-corporation contract would be advisable for the better protection of the interests of the enterprise. The validity of such contracts should be subjected to the "fairness test" and always open to close scrutiny by the courts.

Such an increase in the authority, stability, and liability of management would certainly improve the operation of Brazilian corporations and at the same time give greater protection to the interests of the shareholders and creditors.

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[83] Articles 625 and 626 of Swiss Civil Code; Chapter V of Italian Civil Code.
[84] Ballantine on Corporations (1946) 122.
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SOVIET CODIFIERS RECEIVE NEW ORDERS

Soviet codifiers have been ordered to abandon twenty years of effort to draft new federal codes. By law of February 11, 1957, the Supreme Soviet of the U.S.S.R. amended the federal constitution to transfer to the fifteen constituent

republics jurisdiction over civil and criminal codes, codes of criminal and civil procedure, and the structure of the courts.[1] The federal government retains by the amendment the authority to establish "fundamentals" for such codes, but the codes themselves will issue from the lawmaking bodies in each republic rather than from the Supreme Soviet of the federal government in Moscow.

The reversal of policy is momentous in principle but insignificant in its practical effect on the average citizen. It is momentous because it marks a change in policy toward the federal-republic relationship which has been moving in the direction of increasing centralization of the Soviet law making process in unbroken pattern since creation of the federation in 1922. It is insignificant in its practical effect on the average citizen because the basic federal codes required by the federal constitution of 1936[2] had never been brought into existence. Only a federal judiciary act had been adopted in 1938 to unify court structure. The citizens of the U.S.S.R. have had to look to the code of the republic in which they dwelt or to the code of a neighboring republic which had been adopted as their own to discern the law that governed them.

To the men who have been at work since 1936 in preparing successive drafts of the various codes, the 1957 amendment will have practical significance, however. They have been engaged in discussing, adopting, and subsequently rejecting proposals for changes in the pattern of codes which was developed before the federation at the time of the adoption of the so-called "New Economic Policy" in 1921.[3] Most of the N.E.P. codes had been drafted first in the Russian Republic during the spring and summer of 1922, but the code of civil procedure had dragged into the early months of 1923. The several Republics which had been brought together in federation as the Union of Soviet Socialist Republics on December 29, 1922, followed the general pattern set by the Russian Republic in preparing their codes, but they made some changes in detail, so that no lawyer could be certain in giving advice as to the law of another republic without having its code before him. The pattern was uniform, but the detail provided for variety in meeting the needs of the differing cultures of the ethnically varied peoples of the new federation.

The codes of 1922 and 1923 had been drafted to provide for a limited form of private enterprise to aid in restoring the economy of a country only recently emerged from devastating civil war. With the adoption of the first of the five-year economic plans in 1928, the assumptions on which the codes had been drawn began to change, and by 1936 when a second constitution replaced the original federal document of 1923, private enterprise had become so limited that no individual was permitted to employ labor in production, nor was any citizen permitted to buy commodities for the purpose of resale at a profit. Obviously, the codes had been much changed textually by 1936, and they looked

[1] Ved. Verkh. Sov. SSSR, 1957, No. 4 (871), item 63.

[2] Art. 14 (u). For English translation see 3 Peasloe, Constitutions of Nations (2nd edition, 1956) 480.

[3] For a review of the early post-war years, see Hazard, "Drafting New Soviet Codes of Law," 7 American Slavic and East European Review (1948) 32.

like patchwork quilts with numerous amendments. Some parts, notably those relating to private stock corporations, remained in the codes without amendment but without enforcement, as vestigial reminders of the private enterprise system for which they had been originally designed.

The Institute of Law of the Academy of Sciences of the U.S.S.R. had begun the work of drafting new codes of law with vigor after the enunciation of the principle by the 1936 constitution of federal enactment of codes. By 1939, a code of criminal procedure was being circulated privately among the law professors of the country. A new criminal code was being hotly debated in the law journals because of the proposal made in the drafting committee that one of the old code's major provisions, that permitting the application of acticles of the codes by analogy to circumstances for which they were not designed, be abandoned. In conversation with the writer in June, 1939, Soviet law professors stated their expectation that the code of criminal procedure would be enacted soon by the Supreme Soviet. No foreigner was shown the draft, but there had been enough in the law journals to indicate that the revisions of the former republic codes of criminal procedure would not be great, except, perhaps, for the creation of the right in an accused to have a lawyer during the period of the preliminary investigation prior to the trial.

The Nazi tanks which rolled into Poland, followed soon after by those of the Red Army occupying the eastern half of that country in agreement with the Germans, brought an end in the summer of 1939 to any talk of new codes to implement the requirement of the 1936 constitution. Not until after the war was the matter raised again, when the draftsmen were put to work. In 1947, they were criticized in the Supreme Soviet for their delays in preparing a draft for submission to the legislative committees of the two chambers of that body. It was true that the pages of the law journals had been full of proposals and counterproposals for the new codes, but only one draft seems to have been published for general circulation. Under date of 1947, a draft civil code of 162 pages was listed in Soviet legal bibliographies, but no one in the non-Soviet world has yet reported having seen it.

Then came what Khrushchev has since characterized as Stalin's period of despotism. All comment as to the provisions which might be desirable in a new set of federal codes disappeared after 1949 from Soviet legal periodicals. It now seems possible that the law professors and officials of the Ministry of Justice of the U.S.S.R. were too frightened to risk any proposals which might have been interpreted by their dictator as an attempt to undermine the system of authority which he had created. They were not allowed, however, to rest unnoticed, for the chief of Stalin's personal secretariat ridiculed their unending discussions in a report to the Communist Party Congress in October, 1952.[4] Andrei Vyshinsky put a stop to speculation on the desirability of eliminating the analogy provisions of the criminal code by writing in 1953 that he thought

[4] Speech of Poskrebyshev, Pravda, Oct. 13, 1952, pp. 9–10.

the case against elimination had not been put sufficiently well in a new textbook.[5] Work on the new codes seemed to have come to a standstill.

With Stalin's death in March, 1953, the gates were reopened, and the legal periodicals refilled with criticism of the old codes and proposals for the new federal codes. By the summer of 1955, the work had progressed to such a degree that Professor Harold J. Berman was told in interviews in Moscow what the new codes could be expected to contain.[6] The writer heard in Paris at a UNESCO conference including Soviet law professors in February, 1956, that the codes were moving ahead but that the schedule was being retarded by a decision to wait until all codes were ready before enacting any of them. The drafts were expected to be put before the Supreme Soviet of the U.S.S.R. by 1958. A campaign was conducted to hasten completion of the drafts.[7]

At the very moment of the UNESCO conference of February, 1956, there began the events which can now be seen to have led to the reversal of policy in February, 1957. The Communist Party's twentieth Congress provided the stage for violent criticism of Stalin's policies. Decentralization has begun in earnest. On May 31, 1956, a decree abolished the Ministry of Justice of the U.S.S.R.[8] In its brief preamble, the decree stated that the step was taken to eliminate excessive centralization in guidance of the work of the courts and legal institutions of the constituent republics and to strengthen the role of the latter. The decree extended to the field of judicial administration a principle that had been gaining ground since Stalin's death in the fields of industrial administration and higher education.[9] In these fields, there had been a transfer of responsibility to the republics for administration of many industries previously operated directly from Moscow, and a return to the Ukrainian Republic of responsibility for operating its own Universities. As the events in Hungary and Poland were to show in the autumn of 1956, there was restlessness to the extent of revolution developing in some of the countries within the Soviet orbit. Restlessness because of what may have seemed like Russification seems also to have been developing, but in less intense form within the republics of the U.S.S.R. as well. A consideration of this restlessness together with the obvious administrative inconveniences brought about by the red tape created by highly centralized administration during Stalin's declining years, may have accounted for the reversal of policy symbolized by the decrees restoring authority over various activities to the republics.

Not until December, 1956, was there indication that the effort to draft new

[5] Vyshinsky, "Some Questions of the Science of Soviet Law," [1953] Sov. Gos. i Pravo, No. 4, p. 10 at 23–24.

[6] Berman, "Law Reform in the Soviet Union," 15 American Slavic and East European Review (1956) 179.

[7] See "Revision of Laws and Codes: A Roundup of Articles," 8 Current Digest of the Soviet Press, No. 24, p. 9 (1956).

[8] Ved. Verkh. Sov. SSSR, 1956, No. 12 (854), item 250.

[9] Hazard, "Governmental Developments in the USSR Since Stalin," 303 Annals of the American Academy of Political and Social Science (1956) 11 at 13.

federal codes had been abandoned. At that time an American student of Soviet law, Darrel P. Hammer, interviewed Soviet law professors in Moscow and learned that there was a change in policy on codification. His understanding of the situation proved to be correct when the agenda for the Sixth Session of the Fourth Supreme Soviet of the U.S.S.R. was published on February 6, 1957.[10] Its second point read "The question of referring to the jurisdiction of the Union Republics legislation on the structure of courts of the Union Republics, and adoption of civil, criminal, and procedural codes."

The chairmen of the commission for legislative proposals in the two chambers of the Supreme Soviet ascended the rostra of their respective chambers on February 9, 1957, to speak to the question of the second point on the agenda. To the speaker in the Council of Nationalities, the decision to amend the constitution followed of necessity the decision of the twentieth communist party congress of February, 1956, to decentralize the housekeeping and cultural work of the state. He declared that the steps already taken in this direction with the decentralization of ministries and industrial administration were well known, and that it had seemed to his commission and that of the Council of the Union that the 1936 constitution would have to be amended to extend this principle into the legislative field.

The cultural differences existing between the republics were reviewed in general terms, the contrast between the Baltic and Central Asian Republics being singled out for special attention, note being taken of the importance of protecting water rights in desert areas as opposed to the lack of necessity for protection of such rights in areas of heavy rainfall. The difference of adminstrative structure was noted as requiring variation in court structure. It was pointed out that in some of the large republics there were subordinate "autonomous republics" and provinces as well as the usual small counties, while in the Baltic republics there were no provinces but only counties. The speaker in the Council of Nationalities added that, of course, fundamental principles must be preserved in the various new codes. There could be no departure in any republic from the structure of the trial court with its professional judge and two lay assessors, nor could there be variation in the basic concept of crime nor of the protection due property. These fundamentals would have to be preserved by federal laws, but the implementation of these fundamentals in codes was to be left to the republics as of old. Lenin was quoted in support of the proposal to strengthen the republics by giving their legislative commissions something to do. The reporter took note of the fact that law faculties existed in most of the republics, and that there had been prepared a large number of legally trained persons in the republics competent to proceed with codification.

Similar considerations were presented by the speaker in the Council of the Union. He dwelt in greater detail on the economic growth of the republics, and upon the transfer to them of many administrative functions in industry since

[10] Izvestiya, No. 31 (12338), Feb. 6, 1957, p. 1.

the twentieth communist party congress. He referred to the abolition of the Ministry of Justice of the U.S.S.R., and to the December, 1956, plenum of the Central Committee of the communist party which had stated the necessity of going farther in strengthening the republics. All of this had dictated, in the view of his commission, the proposed restoration of legislative authority to the republics, but like his colleague in the other chamber, he emphasized the necessity of preserving common general principles of law in all republics. He also quoted Lenin, but this time to stress the importance of uniformity in the law while preserving local initiative to meet the special requirements of local situations.

The projected amendment was accepted with the usual unanimity by the deputies in both chambers of the Supreme Soviet on February 11, 1957, to start the Soviet draftsmen on a new path. Presumably, the first task will be, as the speakers declared it to be, to prepare the general principles of law to be followed by the republics in the preparation of their codes. It remains to be seen whether these general principles appear as somewhat abbreviated forms of the draft federal codes which were approaching completion when the decision was made to amend the constitution, or whether they will appear in brief decrees on specific subjects, such as, for example, the policy to be followed in eliminating or preserving the present analogy provisions of the criminal codes or the exclusion of lawyers from the stage of preliminary investigation in criminal procedure. Whatever the form, it is evident that time will be required to draft the new codes, and it is likely that the smaller republics will wait, as they did in 1922, for the Russian Republic to act in providing an example before drafting their codes. Delays will probably occur, and it may be that they will be welcomed by the Soviet policy makers, for this is a time when all is not quiet in Eastern Europe. It may be that policy decisions are hard to make so soon after the unsettling events of 1956 within the Soviet orbit, and the policy makers may not yet be ready to decide whether they dare eliminate the analogy provisions from the criminal code or permit the accused to have an attorney at an early stage in the criminal procedure. The constitutional amendment may have been proposed to satisfy the drive for greater authority in the republics, as the proponents declared, but it may also have been favored because it permitted time to elapse before decisions have to be made, and it may even have been favored because it will permit a few isolated experiments in one or several republics to see how changes in them all would work in practice.

With a communist party which is not federated in structure but held to strict discipline administered by a centralized apparatus, the policy making of Soviet draftsmen cannot be expected to depart from the general schemes envisaged by the Central Committee of the party and by its guiding presidium.

The new constitutional amendment does not, therefore, suggest a move in the direction of establishing the broad legislative powers retained by the states in the United States of America. The federal-republic relationship within the U.S.S.R. remains very different from the federal-state relationship in the

United States. Although the current step toward increase in the authority of the units which make up the Soviet federation may result in little change in practice, the foreigner must not conclude that the change does not mean something psychologically to the masses of people who are not always fully aware of the centrally controlled policy restraints upon their local officials.

JOHN N. HAZARD*

* Board of Editors.

"SOCIALIST LEGALITY" IN THE U.S.S.R. SINCE THE XXth PARTY CONGRESS

The concept of "socialist legality" is not new to Soviet literature, and even Stalin himself had, in times past, once been acclaimed for lifting it to new heights.[1] But, even though the expression is old and hackneyed, recent events in the Soviet Union seem to have infused it with a new content and meaning.

Ever since 1950 an extensive discussion of Soviet legal institutions has been going on. At first it achieved little, due, it has recently been charged, to pressure being brought to bear by Beria, from 1950 to 1952, on the participants to prevent any study of questions "connected with the practice of violating socialist legality and the rights of Soviet citizens, with the practice of unjustified repressions."[2] Nevertheless, even after Beria's elimination, the rather scholastic debate centered largely on general principles, and still ventured little in the way of criticisms and substantive proposals. It is only in the aftermath of the revelations of the XXth Party Congress that Soviet jurists showed greater initiative in advancing constructive proposals of reform and in criticizing existent shortcomings.

These recent changes in the Soviet legal system, which include not only theoretical redefinitions of concepts and principles, but also practical institutional reforms, seem to presage a real transformation in the U.S.S.R.'s judiciary. First, let us examine some of the main theoretical revisions.

Theory of Law and Constitution

The legislative role of the Supreme Soviet has been increasingly emphasized since February 1956, and, in line with this, a new definition of Soviet law has been offered by Soviet jurists. The previous definition of Soviet law as "an act of the sovereign organ of Soviet authority, establishing norms of law express-

[1] A. Ya. Vyshinsky, Voprosy Teorii Gosudarstva i Prava (Questions of Theory of State and Law), 2nd ed.. Gosyurizdat, Moscow, 1949, p. 175; A. I. Denisov, Teoriya Gosudarstva i Prava (Theory of State and Law), Yurizdat, Moscow, 1948, p. 375.

[2] V. Nikolaev, "Preodolenie nepravilnykh teorii v ugolovnom prave—vazhnoe uslovie ukrepleniya sotsialisticheskoi zakonnosti," (Overcoming incorrect theories in criminal law—important condition for strengthening socialist legality), Kommunist, September 1956, No. 14, p. 55.

ing the will of the working class, the will of the entire Soviet people,"[3] has been rejected as lacking in precision and too formalistic. It is stressed, at present, that to legislate is the function solely of the Supreme Soviet,[4] and law is now defined as "a normative act enacted by the Supreme Soviet, creating general rights and obligations, of universal applicability, and having primacy over the acts of any other organ of governmental authority."[5]

Thus, not only the source and the content of law (as distinguished from any other measures enacted by the Supreme Soviet) are determined, but law is also made supreme over the ubiquitous directives issued by the various branches of the Soviet bureaucracy. The present status of the administrative and judicial decrees, thus downgraded, remains uncertain. Some jurists reject the idea that they constitute a source of law at all,[6] but, in general, the tendency has been to recognize them as "a source of law subordinate to legislative measures,"[7] and void if in conflict with them.

The theoretical justification for the power of the Presidium of the Supreme Soviet to issue decrees has presented greater difficulties. Deploring the past practice of the Supreme Soviet of meeting mainly to confirm decrees of its Presidium, it has been suggested that the Presidium's power to issue decrees changing existing law either be frankly recognized and regularized through express constitutional grant of power, or, better yet, be limited to a minimum, leaving legislation to the Supreme Soviet itself.[8]

A new re-evaluation of the Constitution's role as "fundamental law" also has been attempted, and the XXth Party Congress particularly emphasized the need to respect and obey the Constitution as the basis of socialist legality.[9] Perversions and violations of the Constitution are admitted to have taken place in the past and blamed on the cult of personality, but it is also reiterated

[3] Akademiya Nauk SSSR, Institut Prava (Academy of Sciences of the USSR, Institute of Law), Teoriya Gosudarstva i Prava (Theory of State and Law), Gosyurizdat, Moscow, 1949, p. 371.

[4] M. Mikhailov, "Nekotorye voprosy sovetskoi konstitutsionnoi praktiki," (Some questions of Soviet constitutional practice), Sovetskoe Gosudarstvo i Pravo (hereafter abbr. as SGP), 1956, No. 9, p. 11.

[5] M. D. Shargorodsky, "Zakon i Sud," (Laws and Courts), Voprosy Ugolovnogo Prava i Protsessa (Questions of Criminal Law and Process), Uchenye Zapiski L.G.U., No. 202, Leningrad, 1956, p. 5.

[6] I. S. Tishkevich, "Yavlyayutsya li rukovodyashchie ukazaniya Plenuma Verkhovnogo Suda SSSR istochnikom prava?" (Are the directives of the Plenum of the USSR Supreme Court a source of law?), SGP, No. 6, 1955; Z. A. Vyshinskaya, SGP, 1956, No. 2, pp. 135–136.

[7] "O yuridicheskoi prirode rukovodyashchikh ukazanii Plenuma Verkhovnogo suda SSSR," (On the juridical nature of the directives of the Plenum of the USSR Supreme Court), SGP, 1956, No. 8, p. 21.

[8] M. Mikhailov, *loc. cit.*

[9] K. Y. Voroshilov, Speech at the 20th Congress of the C.P.S.U., Foreign Languages Publishing House, Moscow, 1956, p. 16; N. S. Khruschchov, Report of the Central Committee of the Communist Party of the Soviet Union to the 20th Party Congress, Foreign Languages Publishing House, Moscow, 1956, p. 109, Resolutions of the 20th Congress of the Communist Party of the Soviet Union, Foreign Languages Publishing House, Moscow, 1956, p. 21.

that this "does not alter the substance of the Constitution" and that "the basic principles of the Constitution remain unshakeable."[10]

To increase respect for the Constitution, greater stability of its provisions is demanded, because great harm, it is claimed, was caused by frequent amendments, often adopted without careful thought or real justification. Since the XXth Party Congress has also emphasized the federal nature of the Union and has already taken a number of measures to re-enforce the sovereignty of the Republics, it is proposed that Articles 22–29b of the Constitution, which list the administrative-territorial divisions of the U.S.S.R. be eliminated and an amendment be inserted in Article 60 granting the Union Republics the power to alter existing territorial arrangements. Since reshuffling of areas and regions (sometimes by simple decree in open violation of the constitutional amendment provisions) has been frequent, the new arrangement would preclude the necessity of repeatedly modifying the Constitution.[11]

Criminal Law and Procedure

The great bulk of the discussion carried on since the XXth Party Congress has been concerned with the theory and practice of criminal law and procedure. The scope of this reappraisal has been very broad, with criticisms and proposals of reform directed practically at the entire field of Soviet penal jurisprudence, and at some of the following points in particular.

a. *The nature of the Soviet criminal process.* Largely abandoning the old viewpoint that a criminal trial in a Soviet court is an affair of a "conciliatory" type, Soviet jurists at present stress the "adversary" aspects of the trial and describe it as an equal contention between the prosecution and the defense, resulting in a process at "the basis of which lies collision and careful, exhaustive investigation of the opposing viewpoints—'for' and 'against'."[12] Defense thus serves a double function, as "aid to the court," but, also, "as a representative of the interests of the defendant."[13]

b. *Right to indictment.* In view of the practice in Soviet criminal procedure of conducting pretrial investigations and examinations, and its general emphasis, at least in the pretrial stages, on the court's "inquisitional," rather than "accusatory" procedure, the Codes of Criminal Procedure of the R.S.F.S.R.[14] and allied Republics prescribe that an accusation, including relevant details

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[10] M. Mikhailov, *op. cit.*, pp. 3–4.

[11] *Ibid.*, p. 5; however, the old practice of altering the territorial arrangements and then amending the Constitution has continued unabated: see, Pravda, July 15, 1956, pp. 2, 4; Izvestia, July 15, 1956, p. 5; Pravda and Izvestia, July 17, 1956, p. 2; Pravda, July 17, 1956, p. 8.

[12] P. S. Elkind, "K voprosu o prave obvinyaeomogo na zashchitu," (On the question of the defendant's right to counsel), Voprosy Ugolovnogo Prava i Protsessa, p. 244.

[13] *Ibid.*, p. 251.

[14] Ugolovno-protsessualnyi kodeks RSFSR (Code of Criminal Procedure of the RSFSR), (hereafter abbr. as UPK RSFSR), Gosyurizdat, Moscow, 1953, Arts. 128 and 129, p. 25.

as to the crime and the "bases for the indictment" be furnished the accused prior to the trial.[15]

The vagueness of the expression "bases for the indictment" has led to controversy in the legal profession. Some jurists have held that to enumerate the "time, *locus*, and other circumstances of the commission of the crime" and the counts under which the charges are pressed, is enough. This interpretation permitted prosecutors effectively to hamstring the supposedly equal status of the parties, by not acquainting the defendant with all the circumstances and evidence for the accusation, hoping to confuse and trap him at the trial.[16] This practice has now been roundly condemned as putting the accused at an unfair disadvantage, and demands have been made to include in the pretrial indictment all the relevant facts and clues.[17]

Another illegal practice, which enabled the prosecutor to harass an individual without pressing formal charges because of lack of sufficient evidence to secure conviction, has been the extension of the concept of "suspect." Originally drafted to permit taking into preventive custody persons whose escape was feared,[18] this provision was abused by the practice of repeatedly questioning individuals without ever charging them with anything specific. This practice was supposedly discontinued by the decree of June 5, 1937, of the Procuracy, yet means were found to get around this prohibition: instead of detaining persons as suspects, seeking to obtain information about a crime from them, and then charging them with it, individuals were questioned as witnesses under oath, and then indicted on the basis of their own testimony. This habit of the prosecutor of avoiding the arduous task of seeking factual evidence, of taking the easy way out and working on a "suspect" or "witness" (a "factually accused person without rights," rather than an "accused with full rights"),[19] has been severely criticized. In line with the call to strengthen socialist legality, it is demanded that the unprotected status of "suspect" be strictly defined and vested with legal guarantees, and that the hounding of "witnesses" be discontinued.[20]

c. *Right to counsel.* "The right of the accused to counsel is one of the concrete expressions of the socialistic democracy and humanism of Soviet justice," writes a Soviet lawyer, but then admits that this right, guaranteed unconditionally by Article 111 of the Soviet Constitution, is imperfect.[21] Putting aside

[15] Except for terroristic and counter-revolutionary cases, regulated by Arts. 467 and 471, UPK RSFSR, pp. 77–78.

[16] M. S. Strogovich, Privlechenie k Ugolovnoi Otvetstvennosti (Charging with Criminal Responsibility), Gosyurizdat, Moscow, 1943, p. 19.

[17] V. Z. Lukashevich, "Obosnovannost obvineniya i garantii prav obvinyaemogo v stadii predvaritelnogo rassledovaniya," (Correctness of the indictment and guarantee of the rights of the defendant in the stage of pre-trial investigation), Voprosy Ugolovnogo Prava i Protsessa, p. 200.

[18] UPK RSFSR, Art. 100, pp. 19–20.

[19] V. Z. Lukashevich, *op. cit.*, p. 203.

[20] *Ibid.*, pp. 206–207.

[21] P. S. Elkind, *op. cit.*, p. 234.

for the time being the special case of terroristic and counterrevolutionary crimes,[22] right to counsel in the normal procedure of the R.S.F.S.R. and the Union Republics is mandatory only if the prosecutor participates, and in cases involving the deaf, the dumb, and other persons physically incapacitated from actively taking part in the proceedings.[23]

Thus a court may, by dismissing the prosecutor, deprive the defendant of counsel. This practice is now under fire, and proposals have been made to include in the future Code of Criminal Procedure of the U.S.S.R. provisions for mandatory counsel in the largest possible number of cases, and to eliminate the discretionary power of the court to bar counsel in nonmandatory cases, if the accused demands counsel.[24] A somewhat daring contention that defense counsel should be obligatory in all cases,[25] has been generally repudiated as inhibiting unnecessarily the freedom of the defendant to choose for himself.[26] It is also planned to eliminate, through codification of procedural laws, the present situation, where various Republics[27] bar or leave at the discretion of the court defense counsel's participation in proceedings of a court of appeals or of a supervisory agency reviewing the verdict. In addition, appeal is made to limit strictly the court's power to reject the defense counsel chosen by the defendant, in favor of another one chosen by the court.[28]

d. *Theory of evidence.* In a statement formerly accepted as authoritative, A. Ya. Vyshinsky once theorized:

> In 1937, in the article "The Problem of Weighing Evidence in Soviet Criminal Procedure," I took a position denying the desirability or feasibility of demanding that the court establish absolute truth, for "the conditions of court work compel the judge to solve the problem not from the standpoint of absolute truth, but from that of maximum probability (or, more correctly: from the standpoint of credibility.—A.V.) of specific factors that are subject to evaluation by the court." I still hold this viewpoint. To *demand* from a court that its decision represent *absolute truth* is obviously impracticable in the circumstances of court work. . . .[29]

Since the XXth Party Congress and the official call "to overcome the mistaken tenets of the Soviet theory of evidence,"[30] serious criticism has been levelled at "Academician A. Ya. Vyshinsky's denial of the necessity for the court to

[22] UPK RSFR, Art. 468, p. 77.

[23] UPK RSFSR, Art. 55, p. 11; also, Art. 55 of the UPK BSSR; Art. 52 of the UPK of the Azerbaijan SSR adds cases involving minors; Art. 88 of the UPK of the Uzbek SSR includes cases in which defense counsel's participation is petitioned by social and trade union organizations.

[24] P. S. Elkind, *op. cit.*, p. 250.

[25] M. M. Grodzinsky, "Ukreplenie sotsialisticheskoi zakonnosti i voprosy ugolovnogo protsessa," (Strengthening socialist legality and questions of criminal procedure), SGP, 1955, No. 3, pp. 95–96.

[26] P. S. Elkind, *op. cit.*, p. 252.

[27] UPK of the Uzbek SSR; UPK of the Uk.SSR.

[28] P. S. Elkind, *op. cit.*, p. 239.

[29] A. Ya. Vyshinsky, Teoriya Sudebnykh Dokazatelstv v Sovetskom Prave (Theory of Court Evidence in Soviet Law), 3rd edition, Gosyurizdat, Moscow, 1950, p. 201.

[30] Editorial, SGP, 1956, No. 2, pp. 7–8.

establish truth in every case and his admission of the possibility of conviction on the basis of mere probability of a given set of facts, subject to the court's evaluation."[31] Others holding the same mistaken views have also been attacked,[32] because "such assertions are at variance with Party and Government demands for the strictest observance of law in the work of investigatory, court, and prosecuting bodies."[33] Vyshinsky's theory of "relative truth" is now branded as "in substance 'a philosophic justification' for the violation of socialist legality,"[34] and has led to the assertion that "a correct and well-founded verdict—and this is the only kind of verdict that a Soviet court should bring in—establishes the objective truth of a concrete fact, which cannot be refuted in the future."[35] In line with this, the dichotomy sometimes drawn between the court's task of establishing the truth and protecting the rights of the accused,[36] has also been denounced.

e. *The role of confession.* Another of Vyshinsky's pet theories which has come under fire is the so-called guilt by confession:

> It is a flagrant violation of the principle of socialist legality and of the foundations of legal science that persons should be pronounced guilty and responsible for serious crimes only on the basis of a personal confession by the accused, as has happened in the activities of investigatory and procuracy organs.[37]

It must be noted, however, that Vyshinsky himself (although others did seek to give his theories more general applicability),[38] advanced the concept of guilt by confession as permissible only in the case of anti-Soviet conspiracies. In fact, in cases where there was sufficient evidence to convict the accused, Vyshinsky relegated the defendant's confession to an insignificance such that at present he is also attacked for neglecting the value of the defendant's confession in normal proceedings.[39]

The present role of confessions in a criminal trial is uncertain. It is agreed unanimously that conviction on the sole basis of an admission of guilt is unacceptable.[40] Attempts to classify confession of guilt as not evidence at all have

[31] *Ibid.*

[32] Particularly, see V. Nikolaev, *op. cit.*, pp. 52–53, criticizing the views held by V. S. Tadvosyan, "K voprosu ob ustanovlenii materialnoi istiny v sovetskom protsesse," (On the question of establishing material truth in a Soviet trial), SGP, 1948, No. 6, p. 70.

[33] Editorial, SGP, 1956, No. 2, p. 8.

[34] V. Nikolaev, *op. cit.*, p. 50.

[35] *Ibid.*, pp. 50–51.

[36] R. D. Rakhunov, "Dokazatelstvennoe znachenie priznaniya obvinyaemogo po sovetskomu ugolovnomu protsessu," (The defendant's confession as proof in Soviet criminal procedure), SGP, No. 8, 1956, pp. 35–36.

[37] Editorial, SGP, 1956, No. 2, p. 8; R. D. Rakhunov, *op. cit.*, p. 38.

[38] Particularly A. Vasiliev, "Taktika doprosa obvinyaemogo," (Tactics of examination of the defendant), Sotsialisticheskaya Zakonnost, 1950, No. 4, p. 20.

[39] A. Ya. Vyshinsky, *op. cit.* (note 29), p. 260; R. D. Rakhunov, *op. cit.*, p. 36.

[40] R. D. Rakhunov, *op. cit.*, p. 38; M. S. Strogovich, Ugolovnyi Protsess (Criminal Trial), Yurizdat, Moscow, 1946, p. 207; V. Nikolaev, *op. cit.*, p. 52; M. A. Cheltsov, Sovetskii Ugolovnyi Protsess (Soviet Criminal Procedure), 2nd ed., Gosyurizdat, Moscow, 1951, p. 182.

been rejected as incorrect;[41] at the same time, the previously prominent role of confessions has also been revised, and admission of guilt now remains merely part of the evidence, inconclusive *per se*, and to be evaluated in the light of the rest of the evidence.[42] In connection with this problem, it has also been proposed to eliminate Article 228 of the Code of Criminal Procedure of the R.S.F.S.R. (and corresponding articles in the codes of the Republics), which permits the courts to suspend further investigation of the case and to proceed directly to the hearings, if the defendant confesses his guilt.

f. *Status and role of the defendant.* It is now being written that "one of the basic principles of Soviet criminal procedure is the concept that the defendant is considered innocent until proven guilty in accordance with established processes of law (presumption of innocence)."[43] Again, Vyshinsky's statement, that "though the responsibility to prove the correctness of the charges lies with the prosecutor, the accused and the defendant are, nevertheless, not free from a similar duty in respect to facts advanced by them in their defense,"[44] is attacked as a factual presumption of guilt. At present it is said, "the obligation to prove conclusively the guilt of the defendant lies on the prosecution."[45]

Soviet criminal procedure is somewhat unusual in that the prosecutor is called upon to play a double role. The pretrial investigators are completely dependent on him, and his directives are mandatory for the investigators,[46] yet the very purpose of the pretrial investigation is to determine all the facts of the case, both those for and against the accused.[47] Soviet jurists see no anomaly in the prosecutor's position, and insist that "the procedural status of the procurator, pressing charges in the court . . . in no way minimizes the significance of the procurator as a representative of an organ responsible for the enforcement of legality."[48] However, to promote greater impartiality on the part of the Procuracy, the previous views which regarded the defendant as an object of the process (or as both its object and subject), have been abandoned

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[41] Theory of M. P. Shalamov, "K voprosu ob otsenke soznaniya obvinyaemogo," (On the question of evaluating the confession of the defendant), SGP, 1956, No. 8, pp. 44–50; see, however, *ibid.*, p. 45, fn. 1, from the Journal editors.

[42] Best expressed by the USSR Supreme Court in the case of Anachko, Feb. 3, 1944, reproduced in G. P. Smolnitsky and M. L. Shifman (ed.), Voprosy ugolovnogo protsessa v praktike Verkhovnogo suda SSSR, (Questions of criminal procedure in the practice of the USSR Supreme Court), Yurizdat, Moscow, 1948, p. 388.

[43] V. Nikolaev, *op. cit.*, p. 52.

[44] A. Ya. Vyshinsky, *op. cit.*, (note 29), pp. 242–43.

[45] V. Nikolaev, *loc. cit.*

[46] See Decree of the Presidium of the Supreme Soviet of the USSR on the Work of Supervision Performed by the Procuracy, Vedomosti Verkhovnogo Soveta SSSR, 1956, No. 9 (827), pp. 259–267, Arts. 19, 20 and 54.

[47] P. I. Kudriavtsev (ed.), "Sudebnoe Sledstvie," (Court Investigation), Yuridicheskii Slovar (Legal Dictionary), Gosyurizdat, Moscow, 1956, Vol. II, p. 476.

[48] "Prokuror v Sovetskom Ugolovnom Protsesse," (The Procurator in Soviet criminal procedure), *ibid.*, Vol. II, p. 270.

as incorrect, in favor of treating the accused as a subject with full-fledged legal rights. From the standpoint of present literature, to regard the accused as a mere "object of potential punishment"[49] is in fact to presume his guilt, "which, of course, cannot help coloring the attitude of the investigator and the court towards the accused, which, in these circumstances, will take on the character of a persecution."[50] The concept that the prosecutor should proceed in accordance with his "inner conviction" of the prisoner's guilt is attacked as a violation of the principle of presumption of innocence.[51] Furthermore, it has been suggested that the use of the expression "dismissed for lack of sufficient evidence" should be replaced by "acquitted" to avoid the stigma attached to the former.[52]

g. *Guilt.* What constitutes guilt is a question which has long preoccupied Soviet legal thinkers. Unwilling to restrict too much the discretionary power of the courts, Soviet jurists have stressed either the effect of socially dangerous acts, independently of the intent of the accused, or have emphasized the frame of mind of the defendant, without taking into consideration the consequences of his act. The first viewpoint permitted lawyers, such as Vyshinsky, to stress the causative relationship between an individual and the result of his action or inaction, regardless of intent or negligence. Causational responsibility was sufficient to constitute guilt and "a person could be charged with criminal responsibility, even though he did not and could not foresee its socially dangerous consequences."[53] In cases charging complicity in a crime, the constitutional factor could be even more ephemeral, since Vyshinsky asserted that "the principle of complicity demands not a causative relationship, but, in general, a link between the individual and the crime committed."[54] Thus, an individual could be held criminally responsible for acts of others, even though he did not take part in the crime and did not even know about it. Just as arbitrary was the notion of criminal responsibility for complicity through an act of negligence.[55] These ill-defined concepts of complicity are now denounced as "giving

[49] Such was the view of Ya. O. Motovilovker, Pokazaniya i obyasneniya obvimyaemogo kak sredstvo zashchity v sovestkom ugolovnom protsesse (Evidence and explanations of the defendant as a means of defense in Soviet criminal procedure), Gosyurizdat, Moscow, 1956, p. 52; M. A. Cheltsov, *op. cit.*, p. 106.

[50] R. D. Rakhunov, *op. cit.*, p. 35.

[51] This view was held primarily by V. Z. Lukashevich, "K voprosu o privlechenii k ugolovnoi otvetstvennosti v sovestkom ugolovnom protsesse," (On the question of charging with criminal responsibility in Soviet criminal procedure), Uchenye Zapiski L.G.U., No. 187, Leningrad, 1955, p. 235; M. L. Shifman, Prokuror v Ugolovnom Protsesse (The Procurator in Criminal Procedure), Yurizdat, Moscow, 1948, pp. 63–68.

[52] V. Z. Lukashevich, *op. cit.*, (note 17), pp. 211–12.

[53] V. Nikolaev, *op. cit.*, p. 54.

[54] A. Ya. Vyshinsky, *op. cit.*, (note 1), p. 119.

[55] Views expressed by M. D. Shargorodsky, Voprosy Obshchei Chasti Ugolovnogo Prava, (Questions of the General Section of Criminal Law), L.G.U., Leningrad, 1955, p. 143, and A. N. Trainin, Uchenie o souchastii (Theory of Complicity), Yurizdat, Moscow, 1941, p. 114; criticized by Z. A. Vyshinskaya, *loc. cit.*

rise to unjustified repressions."[56] The second viewpoint defined guilt not by its effects, but simply by the court's "class, social, and moral evaluation of the psychical condition of the individual,"[57] regardless of whether his actions constituted a crime or not. Both viewpoints have now been rejected, the first as too mechanistic and narrow, and the other as placing the "discretion of the court above the law,"[58] and the new doctrine affirms that "no one can be held criminally responsible for an act which does not constitute a crime as defined by law."[59] The theory that an act without any consequences may, nevertheless, constitute a crime is now the subject of a doctrinal controversy, with no immediate prospects of solution.[60]

h. *Analogy.* Punishment by analogy, according to Soviet law, is required by the impossibility of foreseeing and enumerating in a criminal code all the possible crimes and socially dangerous actions, which, nevertheless, ought not to escape sanction. It is claimed that, after "the adoption of the Stalin Constitution the scope for the use of analogy has been further restricted, due to the achievement of the principles of the stability of laws."[61] Even back in 1948 it was pointed out that codification of criminal law would tend to bring about the elimination of analogy, since the attempts to erase "Kazan legality" and "Kaluga legality" in favor of uniformity would be frustrated if judges were given the right to determine by themselves what constituted a socially dangerous act.[62] It must be remembered that, in theory at least, the use of the principle of analogy is rather severely restricted: the crime must be socially dangerous, its description must be absent from the list of crimes included in existing criminal legislation, it must be subsumed under the most similar provision of the criminal code, it cannot be punished by analogy with another crime if it contains something exempted from punishment in the provision for that other crime, and it cannot entail greater sanctions than the crime to which it was likened by analogy. Still further restrictions of the principle of analogy are in prospect, and a recent attempt to extend its applicability not only to the Special Part of the Criminal Code, but also to its General Part, has been branded as incorrect, because

> the application of analogy to the General Part of the criminal code can and inevitably will shake the stability of the law; because it can and inevitably will violate the rights of citizens

[56] V. Nikolaev, *op. cit.*, p. 54.

[57] A. N. Trainin, Sostav Prestupleniya v Sovetskom Ugolovnom Prave (Concept of Crime in Soviet Criminal Law), Gosyurizdat, Moscow, 1951, p. 126.

[58] V. Nikolaev, *op. cit.*, p. 57; M. D. Shargorodsky, "Nekotorye voprosy prichinnoi svyazi v teorii prava," (Some questions of causative relations in the theory of law), SGP, 1956, No. 7, p. 51.

[59] M. Mikhailov, *op. cit.*, p. 15.

[60] Z. A. Vyshinskaya, *op. cit.*, 137, and editorial footnote; M. D. Shargorodsky, *op. cit.*, (note 58), p. 39.

[61] Ugolovnoe Pravo, Obshchaya Chast (Criminal Law, General Part), 4th ed., Yurizdat, Moscow, 1948, p. 246.

[62] *Ibid.*, p. 247.

no less than if the limitations imposed upon its application to the articles of the Special Part of the criminal code are disregarded.[63]

Reforms

Paralleling the readjustments in Soviet legal theory, a number of institutional reforms have been made in the Soviet Union, which, more cautious and less spectacular than the verbal reappraisals, have important practical implications nevertheless.

Shortly after Stalin's death, on March 27, 1953, an amnesty was promulgated in the U. S. S. R., followed by another on September 17, 1955, but the truly important first step taken was the abolition, on September 1, 1953, of the Special Commission of the Ministry of Internal Affairs by a decree of the Presidium of the Supreme Soviet.[64]

The Special Commission was instituted on July 10, 1934, by the Central Executive Committee's decree, "On the Creation of an All-Union People's Commissariat of Internal Affairs," and was given authority to "pronounce, by administrative order, sentences of banishment, exile, imprisonment in corrective labor camps up to a period of five years, and deportation beyond the borders of the U. S. S. R."[65] Empowered to apply extrajudicial measures, the Commission replaced the court board and the extraordinary three-man tribunals of the O. G. P. U., and its liquidation must, doubtless, be understood as part of the general policy of downgrading the secret police initiated soon after Stalin's death. Branded as "an extralegal body used very frequently by Beria and his gang to deal summarily with innocent persons," its demise was hailed as of "great significance in strengthening socialist legality." It is also in line with the present official program of "liquidating as fast as possible the consequences of the misdeeds of Beria and his gang,"[66] "that despicable Beria gang that tried to remove state security agencies from the control of the Party and the Soviet government, to place them above the Party and government and to create within these agencies an atmosphere of lawlessness and arbitrariness."[67] The immediate effects of this decree, however, were quite limited, for the Commission was largely an executory agency, its chairman, the Minister of the Interior, being endowed personally with identical powers by the law of September 5, 1934.[68]

Further steps were taken after the XXth Party Congress, and, on April 29, 1956, the Presidium of the Supreme Soviet of the U. S. S. R. published the text of the following decree:

> The Presidium of the Supreme Soviet of the USSR decrees the abrogation of the decree of the Presidium of the Central Executive Committee of the USSR dated December 1, 1934, "On the Procedure for Conducting Cases Involving the Preparation or Commission of Ter-

[63] Z. A. Vyshinskaya, *op. cit.*, p. 139.
[64] R. A. Rudenko, in SGP, 1956, No. 3, p. 15; M. Mikhailov, *op. cit.*, p. 15.
[65] Izvestia, July 11, 1934.
[66] R. A. Rudenko, *loc. cit.*
[67] Editorial, SGP, 1956, No. 2, p. 17.
[68] Chronique de Politique Etrangere, Brussels, Nov. 1956, Vol. IX, No. 6, p. 803.

rorist Acts" and the decree of the Central Executive Committee of the USSR dated December 1, 1934, and September 14, 1937, "On the Introduction of Changes in the Existing Codes of Criminal Law Procedure of the Union Republics," by which decree extraordinary procedures of investigation and court examination were instituted in cases of crime provided for under Articles 58-7, 58-8 and 58-9 of the Criminal Code of the RSFSR and under corresponding articles of the criminal codes of other union republics.

It is established that in the future, during the investigation and court examination of cases involving crimes covered by the above mentioned articles of the criminal codes, the investigating organs and courts must be guided by the rules of legal procedure established by the codes of criminal law procedure of the union republics.[69]

The extraordinary measures abrogated by the above decree[70] had modified the normal trial procedure[71] for cases of terroristic and counterrevolutionary crimes; these cases were tried in the absence of representatives of the prosecution or defense, the pretrial investigation had to be completed within 10 days (instead of the usual 2 months), the charges were to be made known to the accused one day before the trial (instead of the usual 48 hours), no appeal or application for pardon was permitted, and the sentence was executed immediately. Trials of counterrevolutionary crimes have now reverted to the normal rules of procedure, and the present Procurator-General of the U. S. S. R. has asserted that "at present, criminal punishment of any type can be meted out only in conformity with the procedure prescribed by law for the crime actually committed."[72] In line with this, it should be noted that the case of Bagirov and the other henchmen of Beria for crimes against the state was "heard in open court session of the city of Baku by the military tribunal of the Supreme Court of the U. S. S. R.,"[73] and the case seems to have gone through normal procedural channels.

Various other measures, all tending in the direction of eliminating some of the worst features of Stalin's regime and revamping the judicial system, have been enacted in the last few years: a decision to put an end to mass forced labor and prison camps was disclosed;[74] a special division in the Procurator-General's office to supervise the investigation of State security organs was set up on April 17, 1956;[75] rehabilitation of some victims of secret police excesses has taken place, and more of this has been promised;[76] measures have been adopted to improve the quality and increase the number of legal cadres in government work, so as to permit closer supervision over bureaucratic arbitrariness;[77] in what is considered to be far-reaching reform the Ministry of

[69] Vedomosti Verkhovnogo Soveta, April 29, 1956.

[70] Arts. 466–473 of UPK RSFSR, pp. 77–78.

[71] *Ibid.*, Arts. 108–142.

[72] R. A. Rudenko, *loc. cit.*

[73] Bakinskii Rabochii, May 27, 1956, p. 2.

[74] New York Times, May 14, 1956, p. 1.

[75] *Ibid.*, April 24, 1956, p. 1.

[76] "Konstitutsiya SSSR i dalneishee ukreplenie sotsialisticheskoi zakonnosti," (The Constitution of the USSR and further strengthening of socialist legality), SGP, 1956, No. 10, p. 5.

[77] Decree of August 30, 1954; see "Za uluchshenie yuridicheskogo obrazovaniya v SSSR," (For improvement of legal education in the USSR), SGP, 1956, No. 8, p. 5.

Justice has been decentralized and its functions delegated to Union Republic ministries, so as to "eliminate superfluous centralization in supervising the work of the Union Republics' court institutions and agencies of justice and enhance the role of the Union Republics in this matter;"[78] the same announcement set up a legal commission under the U. S. S. R. Council of Ministers "to be charged with codifying and systematizing Soviet legislation, drafting . . . and considering in a preliminary way legislative bills . . . on matters of uniform standard of procedure."[79]

Finally, two other major reforms remain to be examined. The first is the passage by the Supreme Soviet of a comprehensive law regulating the structure and work of the Procuracy. This remedies what has been admitted to be a "clearly abnormal situation . . . in which the state body called upon to exercise higher supervision over the strict enforcement of the law was itself operating without a legislative act to regulate the procedure, limitations, and competence of its activity."[80] The new legislation markedly strengthens the independence and increases the supervisory and investigative powers of the Procuracy.[81] It is paradoxical that added authority should be granted to the Procurator's office, while, at the same time, widespread denunciation of Vyshinsky's theories and practices as Procurator-General is rife. In much the same way that the neglect of the Soviet Constitution has been attributed to the cult of personality, the failure of the Procuracy has been blamed on Vyshinsky's personal aberrations, and the Procuracy itself is still hailed as the main organ for "supervising legality."[82]

A decree of August 14, 1954, supplemented by another of April 25, 1955,[83] effected the decentralization of the so-called "post-audit" system of the U. S. S. R. Presidia were established within the Supreme Courts of the Union and Autonomous Republics and provincial courts, and empowered to review decisions which have become final to determine whether a new trial should be granted.[84] The right to protest a court's verdict and to instigate a review, formerly and exclusively the jurisdiction of the Procurator-General or the Procurator of the Republic, has been extended also to the President of the Supreme Court of the U. S. S. R. or of a Republic, or any of their deputies. A twofold result was achieved by the measure: it decentralized the burden of "post-audit," and it increased considerably the possibilities of supervising and reviewing a court's decision.

[78] Pravda and Izvestia, June 3, 1956, p. 1.

[79] Text of Moscow's Announcement, New York Times, June 3, 1956, p. 3.

[80] R. A. Rudenko, *loc. cit.*

[81] See above, note 46.

[82] R. A. Rudenko, *loc. cit.*

[83] Vedomosti Verkhovnogo Soveta, No. 17 (881), August 27, 1954, Item 360; *ibid.*, No. 7 (825), May 20, 1955, Item 166.

[84] See J. N. Hazard, "Governmental Developments in the USSR Since Stalin," The Annals, January 1956, pp. 20–21.

Conclusions

Conditions on the Soviet legal front are still largely unsettled, and a further crystallization of trends must be expected. Yet, considerable change has taken place since Stalin's death, and a certain pattern seems to be emerging, especially since the XXth Party Congress. In the first place, the brunt of reform has fallen on the secret police, which appears to have been effectively shorn of most of its extraordinary and extralegal powers. Furthermore, the other measures also seem to be tending in the same direction of achieving greater stability in the judicial system: codification of the laws is called for to increase the citizen's certainty as to his rights and obligations, to eliminate judicial and administrative arbitrariness;[85] better cadres of lawyers are demanded to heighten the profession's and government's standards of performance and its integrity;[86] decentralization is expected to increase the area of responsibility, provide for more checks and balances, bring the officials closer to the masses.[87] It should be noted that even the strengthening of the Procuracy is not incompatible with these aims. In Soviet legal thought, the Procuracy has always been regarded as an organ whose function "is to see that the laws are correctly and uniformly applied throughout the country," because "Soviet law must be *uniform* throughout the Soviet Union."[88] Such uniformity, if achieved, would eliminate, or at least restrict to a minimum, the applicability of analogy.

It is true that nothing has as yet been achieved in the realm of codification of the law. Rehabilitation of purge victims has proceeded very cautiously, and no top figures have as yet been reinstated; moreover, even those restored to favor comprise only individuals whose death is blamed on secret police executions, and there as yet has been no important reassessment of the court verdicts of the 1930's. And, added to all this, Soviet newspapers still lambaste comrades who persist in acting arbitrarily, and violations of socialist legality still occur and still invite the criticism of the press.[89]

Yet, the situation as a whole looks promising. The terror of the secret police has been largely curbed. There has been a certain humanization in Soviet Law,[90] and repeated demands have been made to apply the spirit, rather than the letter, of the law.[91] That any rehabilitation of victims and admissions of mistakes have taken place at all is in itself a sign of hope. Moreover, the tone of the present discussion of Soviet law, the scope and intensity of the criticism

[85] For the chaotic state of affairs in Soviet law, see the pleas in Izvestia, August 14, 1956, p. 2; February 4, 1956, p. 3; V. S. Tadvosyan, "Nekotorye voprosy sistemy sovetskogo prava," (Some questions of the system of Soviet law), SGP, 1956, No. 8, p. 406.

[86] SGP, 1956, No. 8, pp. 3–12.

[87] New York Times, June 3, 1956, p. 1.

[88] V. Karpinsky, The Social and State Structure of the U.S.S.R., Foreign Languages Publishing House, Moscow, 1950, p. 145.

[89] Kommunist Tadzhikistana, May 18, 1956, p. 3; Sovetskaya Moldavia, April 12, 1956, p. 2.

[90] "Minor negligence and other 'administrative offenses' will no longer be considered violations of the criminal code. Acts 'analogous' to illegal acts will no longer be punishable under the criminal code," New York Times, April 24, 1956, pp. 1, 6.

showered at existing conditions, the originality and practicality of the suggestions for reform, all this is unusual *per se* and augurs well for future improvements, even more, perhaps, than the curbs already imposed on the courts, the Procuracy, and organs of State security.

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[91] Izvestia, January 5, 1956, p. 2.

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NEW LEGISLATION

JAPAN: REVISION OF THE NEW CIVIL CODE—A report on present efforts to revise the New Civil Code of Japan will be of particular interest to Americans because of their predominant role in the postwar Allied Occupation of Japan.[1] Those attributing postwar reforms of the Old Civil Code to the Allied Occupation, and regarding revision as marking a retreat from the egalitarian and individualistic principles of the New Constitution and the New Civil Code, variously may call revisionist tendencies "reaction to the Occupation," "resurging conservatism," or "new nationalism." In the writer's opinion, however, the revisionist movement reflects more the need generally to examine existing inconsistencies between the scheme of the New Civil Code and the realities of family life in Japan.

War and occupation were the occasion for the 1948 reforms, but the changes to a large extent incorporated earlier investigations by the Japanese themselves dating from the early 1900's. The 1948 reforms and present efforts towards revision both follow the established procedure of investigation by a Law Revision Commission specially organized under the Ministry of Justice. Perhaps the most striking difference between the revision process of 1955 and that of the Meiji Era or the Allied Occupation is the fact that determination ultimately rests with the Diet and people of Japan, and not with persons or groups in positions of political control.

This report seeks to present the objects of controversy in the light of their sociological background, including the results of investigations concerning public opinion and the New Civil Code.[2]

[1] English language articles on the New Civil Code include Blakemore, "Postwar Developments in Japanese Law, 1947," Wisc. Law Rev. (1947) 632; Steiner, "Postwar Changes in the Japanese Civil Code," 25 Wash. L. Rev. (1950) 286; Wagatsuma, "Democratization of the Family Relation in Japan," 25 Wash. L. Rev. (1950) 405; Steiner, "Revision of the Civil Code of Japan: Provisions Affecting the Family," 9 Far Eastern Quarterly (1950) 169. See also Rabinowitz," Materials on Japanese Law," 4 Am. J. Comp. Law (1955) 97. German: Izuki, "Die Modernisierung des japanischen Familien- und Erbrechtes," 19 Zeit. Aus. (1954) 104.

[2] Reports on field investigations by the writer in Yamaguchi Prefecture include: Fueto, Yamaguchi-ken Kumage-gun Kaminosekison Iwai-shima no Hoshakai gaku-teki Kenkyu (A Report on Research in Iwai-shima Island, Kaminoseki Village, Kumage County in Yamaguchi Prefecture), Vol. 4, No. 5 & 6 Yamaguchi Journal of Economics (1953); Fueto, A Report

Changes in the family law and the law of succession,[3] now objects of controversy, were attempts hastily to comply with the New Constitution of Japan.[4] The democratic New Constitution is related to family life in Japan through Article 24, which establishes the principles of equality of the sexes and dignity of the individual. This principle compelled reform of the Old Civil Code by way of the removal of the disabilities of sex and the prerogatives of age.

To what extent does the family structure visualized in the New Civil Code differ from social reality as compared to the extent to which that visualized in the Old Civil Code differed from social reality? There are two types of family structure in Japan: the Confucian type and the popular type. The Confucian type was characteristic of the nobility, the great landowners, the great merchants, and the military class of feudal Japan; and the more indigenous popular type was characteristic of the farmer, the fisherman, and city commoner of feudal Japan. Neither type was democratic in the modern sense: the characteristic absolute authority of the family head—usually the husband and father—was more manifest in the Confucian type; but equally suppressive of individualistic thinking was the role of tradition and custom underlying the apparent co-operative spirit of the family type. In the intervening centuries, there has been considerable fusion of elements of each type, and their present-day distinction has become more one between rural and urban populations.[5]

In the past, the family has been a center of industrial and economic activity among a people where the means of livelihood has been difficult to achieve. It was also a center of ancestral worship and served to strengthen the spiritual foundations of a nation competing in the world power struggle.

The economic function is perhaps the only justification for any revival of the "family system." Whether or not the "family system" visualized in the Old Civil Code was appropriate to the past age, there is little doubt that it is contrary to the spirit of the New Constitution and the New Civil Code. But viewing the present controversy as a struggle to resolve conflicts within a society beset by rapid change, I shall consider the problem in particular in relation to the abolition of the "family system" and the new freedom to marry and divorce.

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on Research on the Family System in Yamaguchi Prefecture, Yamaguchi University (1954); Fueto, "The Discrepancy between Marriage Law and Mores in Japan," 5 The American Journal of Comparative Law (1926) 256.

[3] Revision was largely limited to Books IV and V of the Civil Code. The revised Civil Code, called the New Civil Code, came into effect on January 1, 1948. For English language translation, see Attorney General's Office—Liaison Section Translation, The Civil Code of Japan (1952); *cf.* Sebald's translation, The Civil Code of Japan (1934).

[4] The New Constitution was promulgated on Nov. 3, 1946, and it became effective on May 3, 1947. For English translation see Department of State, The Constitution of Japan, Far Eastern Series 22 (1947).

[5] Fueto, "The Custom and Sex Relations before Marriage in the Farm and Fishing Villages," No. 4, Sociology of Law (1953); Takeyoshi Kawashima, "The Family Organization in Japanese Society," (1948) 7–15; Fueto, "Two Types of Japanese Family Systems" (English), V, Nos. 11 and 12 Yamaguchi Journal of Economics (1953) 102–110.

I. Abolition of the "Family System"

Abolition of the "family system" was the fundamental reform in the new Civil Code. In addition to recognizing the status of husband and wife, parent and child, and kinship, the Old Civil Code accorded the family an independent legal significance, and the existence of legal rights and duties often depended upon family membership quite independent of any question of personal status.

In agricultural communities characterized by the Confucian-type family, pedigree remains important in such matters as marriage, speech, local politics, and sexual mores. The authority of the family head is strong, and family consent is important before marrying. It is still a typical farm scene to have the eldest son and his wife without pecuniary compensation operate the farm and support his aged parents, although all the property remains in the name of parents, in anticipation of succeeding to all the farm property upon the death of his parents. In practice, the younger children abandon their inheritance in favor of the eldest son, and the daughter-in-law also expects continued support although her husband may predecease her. All these practices are contrary to the spirit of the New Civil Code.[6]

a. *Support.* One effect of the abolition of the "family system" has been to abolish the support obligation between parents-in-law and son-in-law or daughter-in-law. Article 954(2) of the Old Civil Code imposed the obligation of mutual support not only among lineal ascendants and brothers and sisters, but also between a spouse and parents-in-law belonging to the same family. Although it was not uncommon that a son who married by adoption was relieved of the obligation to support his natural parents, the ordinary effect of the latter provision was to impose the obligation between the husband's parents and their daughter-in-law. The change under the New Civil Code is contrary to the practice in agricultural communities, and generally is regarded as undesirable.[7]

b. *Succession.* Correlative to the abolition of the "family system" was the change from the principle of unitary succession to the principle of equal succession. Under the Old Civil Code, the head of the family had the right to control all family property, which property in turn devolved in its entirety to his successor as head of the family—usually the eldest son.

Equal succession rights under the New Civil Code mean equal rights in the value of the estate. Where an estate has a multiplicity of assets this system is quite workable, but in Japan where most farms and home industries are small, division not only works individual hardship but also may diminish the value of distributive shares. Equal succession aggravates also the problem of fragmentization of farm land. It means also that aged parents are left dependent

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[6] Fueto, "Two Types of Japanese Family Systems," 102–110; Steiner, Postwar Changes in the Civil Code, 286–293; Wagatsuma, *op. cit.*, 414–426.

[7] Fueto, Public Opinion for Japanese New Civil Code, Vol. 5, No. 4, The Horitsu-no-Hiroba (1952); Wagatsuma, *op. cit.*, 406–414.

upon children whose only incentive, besides the moral one, to support aged parents is the possibility of a greater share in succession by testamentary disposition. Yet the freedom to write a will is seldom exercised in Japan, and where exercised it may not contravene legally secured portions. (Article 1028.)

Although the practice of voluntary or involuntary abandonment of rights in succession in favor of the eldest son has ameliorated the above effects, proposals reviving to some extent the "family system" and thereby a system of unitary succession have been made in anticipation of a growing individual consciousness and consequent abandonment of this practice. It also has been suggested that the formal requirements of a valid will be relaxed, particularly the requirement of acknowledgment by a public notary. The writer suggests rather that the laws of succession be amended to provide for greater distributive shares to children who have supported or contributed towards the support of their parents.[8]

c. *Object of worship.* One aspect of the "family system" retained by the New Civil Code is separate provision for devolution of family genealogies, implements of worship, and family tombs. Under Article 897, a successor is designated by the deceased and absent such designation decided by local custom. It has been suggested that separate provision for objects of ancestral worship has no place in the New Civil Code.[9]

d. *The Family Court.* Related to the abolition of the "family system" is the establishment of the family court, established in anticipation of a greater volume of family litigation upon relaxation of family controls. There has been little pressure to amend the probate function of the family court, but there is increasing pressure for strengthening the investigative function of the court which concerns consensual divorce, to be considered later.[10]

II. Freedom to Marry and Divorce

Abolition of the "family system" destroyed also the foundations of family consent. Under the Old Civil Code, a child belonging to the same family in many instances was obliged to submit to the will of the head of the family. In matters of marriage and divorce, a man under 30 and a woman under 25 could not marry without consent, and consent to divorce was required for a party under 25.

In villages characterized by the popular-type family, differences of pedigree are not important. Young people associate more freely, their sexual mores are freer, and they are relatively free to choose their mates and enter into marriage. In fishing communities where there is a high degree of divorce when one spouse is from a nonfishing community, divorce almost always is by consent and without any demand for property settlement. Furthermore, people in fishing communities are little concerned over succession rights. These practices prob-

[8] See Steiner, *loc. cit.*, 308–309.

[9] On the family system and family name, see Steiner, *op. cit.*, 301–302.

[10] See Steiner, *loc. cit.*, 304–306.

ably reflect economic conditions rather than any appreciation of the New Civil Code.[11]

a. *Formalities of marriage.*[12] Article 739 of the New Civil Code simply requires registration as man and wife with the Family Registrar as the foundation of a legally subsisting marriage. Article 750 provides that the husband and wife assume the name of husband or wife in accord with their understanding at the time of marriage. Under the Old Civil Code, marriage was defined as the changing of family by the wife, and marriage by adoption as the changing of family by the husband. The New Civil Code in effect reduces the legal significance of the family to a unit for purposes of registration with the Family Registrar.

Procedurally, registration is simpler than the Anglo-American civil marriage, where civil ceremony means only the substitution of a judge for a church official, and the double step of applying for a license and the exchange of vows remains. A judge or church official would not perform a ceremony without presentation of a license, but in Japan no officiation is necessary. Thus in Japan, there is not the same compulsion to register a marriage, and it is not uncommon that couples live in a state of de facto matrimony not recognized by the law. Most Japanese consider a marriage as subsisting upon parental consent and consummation, and family approval in many cases determines whether or when a marriage is registered. The family register is to some extent regarded as a book of pedigree, and as it is considered a family disgrace to have a name entered into the register only later to be struck off, it is the practice not to register a marriage until after a trial period. Furthermore, in certain areas of Japan where the concept of civil marriage has not taken hold, there are a large number of de facto marriages unregistered simply through ignorance of the registration requirement.

The registration requirement was continued in spite of the above practices. There is further criticism that upon marriage children are required to establish their own family separate from that of their parents, often contrary to prevailing social practices, even when the children, so marrying, can enjoy relative economic independence.

Controversy over civil marriage requiring registration is not unlike that over the outlawing the common-law marriage in America. Proponents of de facto matrimony point out the injustices resulting from the discrepancy between the legal requirements of marriage and social reality. Proponents of civil marriage, on the other hand, point out the dependency upon marriage under modern law of property rights upon succession and economic benefits under social legislation. The commercial relationships of an urban society also require easy ascertainment of the marriage relationship by some objective criterion such as public registration. Recent Japanese social legislation has recognized the equality of the de facto and legal wife, and judicial decisions have accorded protec-

[11] See Steiner, *loc. cit.*, 299–301, 302–304; Wagatsuma, *op. cit.*, 420–422.

[12] Fueto, "The Discrepancy between Marriage Law and Mores in Japan," 5 The American Journal of Comparative Law (1956) 256.

tion to the de facto spouse in cases similar to those in community property states of America where the courts have granted protection to a de facto spouse by way of distribution of the "community property."

b. *Two kinds of divorce.* The New Civil Code lays down no new legal requirements for divorce. On the contrary, not only does the New Civil Code abolish the family consent requirement, but it also provides that minors who enter into marriage with parental consent thereafter are deemed adults and thus may divorce freely. Under the Old Civil Code divorce was defined as the leaving of family.

There are two kinds of divorce in Japan: judicial divorce and consensual divorce. Judicial divorce for cause requires court approval, and consensual divorce does not require court investigation even to determine whether consent is in fact voluntary.[13]

Proponents of consensual divorce argue that the sole purpose of judicial approval should be to ensure mutality of consent. They fear also that stricter divorce procedure would result in a large number of separations without divorce. On the other hand, as the social importance of the family as provider and educator of children increasingly becomes a matter of public concern, divorce also properly becomes a matter of court concern. And although divorce in Japan has never needed moral justification as in the common-law countries, the limiting effect of family responsibility as well as family consent in matters of marriage and divorce of the past is rapidly disappearing. Thus, however perfectly abuse of consensual divorce is prevented, still as a system based on the idea of freedom of divorce, it cannot be a perfect system. The writer, therefore, feels that the more appropriate solution would be simply to abolish consensual divorce in favor of judicial divorce.

III. Public Opinion and the New Civil Code

The family court was established in anticipation of an increase in personal relations and probate litigation, but the volume of litigation has not yet reached those proportions where the efficacy of judicial solution adequately serves as an index to the suitability of revision. The writer has sought to determine, therefore, the attitude of various population groups towards the new law of the New Civil Code. The area of investigation was Yamaguchi Prefecture in southern Japan, but it is believed that conclusions based on such investigations generally are applicable because of the similarity of population distributions in the various prefectures of Japan.

Although revival of the "family system" popularly has come to represent the revisionist movement, most Japanese scholars oppose any revival of the "family system." Educators and students support the abolition of the disabil-

[13] According to the statistics of the number of divorces of all Japan.

	Total number of divorces	Consensual divorces
1932	51,437	51,096 (99%)
1950 (until Oct. 31)	83,000	76,770 (92.5%)

ities of sex and the prerogatives of age, and although perhaps inconsistent with the ideal of equality, strong dissent is directed against the principle of equal succession.[14] Dissent is also directed against the abolition of the support obligation between parents-in-law and the daughter-in-law. Both dissents undoubtedly reflect regard for rural conditions.

Perhaps the greatest divergence in opinion is found between urban and rural populations rather than between educated and uneducated circles. The results of opinion polls among city and agricultural groups reveal the following: that city dwellers generally support abolition of the "family system," abolition of the family consent requirement for marriage, abolition of the support obligation between parents-in-law and the daughter-in-law, and establishment of the principle of equal succession. Rural populations, on the other hand, generally do not support the reforms of the New Civil Code.[15]

As Japan continues to industrialize and urbanize, it will find more suitable the egalitarian and individualistic principles of the New Civil Code. Present controversy, to a large extent, reflects the fact that the family agricultural unit and the family industrial unit are still the fundamental units of Japanese society. It would seem, therefore, that the law of the New Civil Code can resist revision only as long as it survives the social momentum of a past age.[16]

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[14] First, it is feared that agricultural lands will be divided into too small parcels. Second, aged parents are left dependent upon the eldest son as the social momentum of a past age.

[15] Wagatsuma, *op. cit.*, 406–414; Fueto, Public Opinion for Japanese New Civil Law (I), Vol. 5, No. 4, The Horitsu-hiroba (1952); Public Opinion for Japanese New Civil Law (II), Vol. 7, No. 1, Horitsu-no-Hiroba (1953); Public Opinion for Japanese New Civil Law (III), Vol. 5, Nos. 5 & 6, The Yamaguchi Journal of Economics (1953).

[16] On contact of the common law with the civil law in Japan, see: Kenzo Takayanagi, "Contact of the Common Law with the Civil Law in Japan," 4 Am. J. Comp. Law (1955) 60–69.

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NORTH BORNEO: REDRAFTING THE LAND LEGISLATION OF BRUNEI—In the early part of 1956, the Dean of the Faculty of Law at the University of Melbourne visited the State of Brunei, at the request of the United Kingdom Government, on business with which he was connected in another capacity. In the course of his visit, however, it was mentioned to him by the Acting State Treasurer that the State was anxious to have a thoroughgoing revision of its land law, and he was asked for his views as to how this might be best accomplished. He replied that the full-time members of the Faculty or some of them would be willing to undertake the task of revising the land laws of the State if the State, in its turn, would pay the out-of-pocket expenses which would be incurred. This offer was accepted and in February, 1956, the writer flew to Brunei for discussions with the senior officials of the Government. The Melbourne Law School thus embarked on a "private Colombo Plan" of rendering

assistance to a South-East Asian neighbour, and the task has now been brought to a conclusion.

I

In order to understand the problems which arose in connection with the revision of the land laws of Brunei, it is necessary to give a brief picture of the economic problems concerning the State.

Brunei is a small State situated on the north-west coast of Borneo and covering an area of a little over 2,200 square miles. The terrain is hilly and honeycombed with rivers, but there are no high mountain peaks. It is understood that at one time the whole of Borneo and a considerable part of the Indonesian Archipelago was under the rule of the Sultan of Brunei, but by a process of war and attrition his domains gradually shrank. In the first half of the 19th century, a large part of the area of Borneo which then remained under his rule rebelled, and one James Brooke arranged to crush the rebellion if he were given the sovereignty over the area involved. He succeeded in fulfilling his obligation and, as a result, the large neighboring State of Sarawak came into being. The Brooke family reigned over it as Rajahs for almost a century. At the conclusion of the Second World War, the then reigning Rajah, Sir Charles Brooke, ceded the territory to the British Government and Sarawak became a British colony.

Meanwhile, Brunei itself continued to maintain its somewhat precarious existence, aided in this regard by a series of treaties with the British Government, made during the 19th century, under which the State placed itself under the protection of the British Government. The earlier treaties gave some powers to the British, but as time went on these proved insufficient. At the beginning of this century, a representative of the British Government, Mr. MacArthur, visited the State for some months and in due course returned and made a lengthy report in which he surveyed fully the existing economy and its possible resources. He recommended that a new protection treaty should be negotiated with the Sultan, and that under this the Sultan should accept a British Resident who would advise on all questions concerning the government of the country (other than those of a religious nature); and, further, that the Sultan should bind himself to accept the advice of the Resident. A treaty on these lines was negotiated in 1906 and forms the basis of the present governmental system.

The population of the State is at present about 60,000, and the bulk of this consists of a race of Asians known as Brunei Malays. Their ethnic origins have not yet been established and their language is a variation of the standard Malay language. The remainder of the population consists of a number of different tribesmen including Kedayans, Besayas and Muruts; the upper reaches of the country have also periodically been invaded by Ibans (Sea Dayaks) from the neighbouring State of Sarawak.

In 1906 the country was under what may best be described as a kind of feudal rule. The Sultan was the supreme ruler, but he was assisted in his task by a Council of Ministers, of the first, second, or third rank, and known as Wazirs,

Chetria, and Mentri respectively. The Sultan was entitled to feudal rights over the whole of the State. All land was in theory owned by him, and all occupiers of land were liable to pay him taxes and render to him certain dues of a kind not dissimilar to those which obtained in England during the 12th and 13th centuries.[1] The sum total of his rights was expressed by the term *keraja'an*, which he was said to possess as Sultan. The *keraja'an* was possessed by him in right of his being the Sultan and was not inheritable by any member of his family who failed on his death to succeed to the Sultanate. Similar rights, but extending over a smaller area, were possessed by the four Wazirs, each of whom possessed these rights, comprehensively termed *kuripan* rights, over a particular area of the State. As with *keraja'an*, a Wazir's *kuripan* rights passed to his successor on his being appointed as Wazir. Lastly, the whole of the area was divided up into a number of small areas over each of which a person could possess feudal rights, again of a similar nature, known as *tulin* rights. These, however, were inheritable, in contrast to the *keraja'an* and *kuripan* rights, and might be owned by private citizens of high standing. They were often rewarded to such citizens by the Sultan for good service.

All these rights were extinguished under arrangements made in the 1906 Treaty. The process proved somewhat lengthy and difficult, being complicated by the existence of a number of forged titles, but the rights have long since ceased to exist; but the Sultan is still said to possess *keraja'an* over the whole of the State, the term for this purpose expressing not so much his feudal rights as his general right of sovereignty.

One of the early acts of the British Resident was to introduce, by means of an enactment made by the Sultan, a new system of land law. This was modelled upon the system then obtaining in Malaya and was of a somewhat primitive type. The Resident granted land, on application being made to him, to any person; and the grant could be, at his discretion, either in perpetuity or for a term of years. In either case the grantee was liable to pay rent, and the grant would usually impose upon him certain conditions, such as that of developing or cultivating the land. In the absence of any other expressed condition, there was an implied condition that the land would be brought under cultivation within a short period, and if the grantee failed to observe this he was liable to lose his holding. All grants of land and dealings with holdings were to be registered in the appropriate one of four district registers which were set up, and no claim to land was to be recognized unless the claimant's interest was so registered. Certain areas were reserved to the Government—e.g. the tracts of land running along the banks of rivers and the sides of roads; and these reservations could not be included in a grant made under the new system. A holding of land

[1] These dues included *pertulonggan*—a payment to be made to the lord on the occurrence of a birth, death, or marriage in his family; *lapis kaki*—a sum of money payable on the visit of the lord or of one of his stewards; and *dagang serah*—best translated as "forced trade". This latter right of the lord enabled him to take from the occupier any goods which that occupier possessed and which the lord wanted himself, provided that he gave some consideration (however small) in return.

was freely alienable and inheritable, but the Land Code had little to say upon either of these subjects beyond specifying the mode of transfer *inter vivos*.[2] A separate enactment provided for the acquisition by the Government of land required for public use which had already been made the subject of a grant. The procedure was a cumbersome one which centered mainly on the assessment of compensation, but it afforded no opportunity to a landholder to challenge the initial premise that the land was needed for governmental purposes.

The bulk of the population are Muslim by faith and their landholdings, therefore, passed on their death in accordance with Muslim law. The rules of that law provided for the taking of the inheritance, by members of the deceased's family, in undivided shares; and in the course of time many holdings have become fragmented into a large number of undivided shares. These were simply recorded by the District Registrars, and any disputes as to a right of inheritance appear to have been settled by the religious courts. The interests of minors received no special protection, and their guardians were able to register dealings with their holdings without query.

Separate enactments provided for the creation of forest reserves and for the exploitation of minerals. It should here be pointed out that a grant of land under the Land Code was in terms limited to a grant of rights over the surface only of the land, all minerals being reserved to the State. In due course this was to prove of the utmost importance, for, between the two World Wars, a large oilfield was discovered on the southern portion of the coast at Seria. This had been surveyed and its development begun when the Second World War broke out, whereupon development was halted. At the end of the Japanese occupation, the existing oil wells were fired, and all installations destroyed in the confused fighting which then ensued. At the same time, the whole of the town of Brunei was destroyed by fire and bombing.

The Sultan had granted full and exclusive rights of development to the British Malaya Petroleum Company,[3] a member of the Shell Group, and after the return of the British Government to Brunei development was resumed at full speed. It proved highly successful, and at present the Seria oilfield is the second largest oilfield in the British Commonwealth.[4] There are some 400 wells at present in production, producing a light crude oil which is easily refined. Further exploration of the resources of the State is constantly proceeding; and there is reason to hope that an even larger field will be discovered under the continental shelf, which has been annexed by proclamation.

The Oil Company operate under licences and leases granted to them direct by the Sultan pursuant to the terms of the Oil Mining Enactment. Their first step is to obtain an exploration licence, which entitles them to carry out over a large area specified in the licence a search for likely fields. They can then obtain

[2] The mode selected was a simple written transfer, signed by both parties and registered in the appropriate district register.

[3] Hereafter called "the Oil Company".

[4] The largest is in Alberta, Canada.

a prospecting licence, which again covers a large area and allows them to prospect freely within that area. If their efforts should prove successful, they can finally obtain an oil mining lease, usually for a term of 30 years, covering a fairly large area which they can exploit to its full. A part of the area comprised in the lease may include land which has already been granted under the Land Code. If so, the Oil Company have to come to terms with the individual landholder in order to carry on operations under his holding; for, although the landholder has no right to minerals, as already noted, the Oil Company have no right to enter upon the surface of his holding for the purpose of their operations. In practice no great difficulty has hitherto been experienced in arranging suitable terms.

The development of the Seria oilfield has brought great benefits to the State. The Oil Company pay to the Sultan a very large sum by way of royalty each year, and the moneys thus obtained are being used for general development purposes. New roads are being built and schools and hospitals provided, to name only a few of the main items of development which are at present in hand. Even so, the small population of the State imposes a brake on the rate of development, and each year the State has had a considerable surplus of revenue over expenditure and has used this surplus to make loans to other Governments, notably the Government of Malaya. The interest on these loans provides a further source of revenue.

But in human affairs every good is likely to be affected by an evil, and this has proved to be the case with the exploitation of the Brunei oilfields. The activities of the Oil Company have involved the dispossession of a number of landholders who were engaged in agriculture, and these have to be resettled. This is no easy task, as for the most part the soil in the State is poor. It has been estimated that a minimum economic holding, even in the more accessible parts of the State, is about 15 acres; both the poor quality of the soil and erosion present a considerable problem.

There has also been in recent years a great deal of speculation in land. The aim of the Government is to enable the people to work on the land as far as possible, and to do so as landholders of the peasant type rather than as tenants of some person who owns a vast area. Unless this can be achieved, it may well be that the accumulation of large tracts of land in the hands of individual owners will bring about a situation not in practice dissimilar to the feudal holdings of the kind which existed before 1906. Speculation in land is, however, difficult to prevent. Whenever the Oil Company decide to investigate a new area, they carry out a preliminary seismographic survey. This is a visible activity, and experience has shown that the appearance of seismographers in a particular area leads to a crop of applications for the grant of land in that area. It is, of course, theoretically possible for the Administration to ensure that no new grants in such areas are made to persons who already have adequate holdings elsewhere, but the theory breaks down in practice. A man who already owns land will apply in the name of his wife or his child or some other relative, and

this can hardly be prevented. Moreover land, once granted as a result of these applications, tends to become sterilized. The owners have not, in the past, made any effort to cultivate it but have been content to hold it and pay the very small rent which the existing Land Code imposed, in the hope that should oil be found they will be able to obtain a high price for their holding from the Oil Company. True, the Government possesses powers to resume the possession of land which has been granted to a man who fails to cultivate it, but politically it is difficult to exercise these powers.

A different kind of problem has been presented by the infiltration of Ibans into the hitherland of the State. Their primitive methods of cultivation bring about the exhaustion of a tract of land within a comparatively short space of time, and they then move on to a new area. The jungle then takes possession of the exhausted area, and the "secondary jungle" which grows there is extremely difficult to clear. Fortunately, this problem has not yet reached unmanageable proportions, but it was a matter which required attention.

There were yet other problems which had to be faced. The Brunei Malay traditionally dwells on or near the water. In Brunei Town itself there is a whole village, in which some 9,000 people dwell, built in the centre of the river, the houses being supported above the river bed on long poles. In other parts of the State, similar groups of houses are built by the river's edge. The people who live in these houses have hitherto either supported themselves by fishing and a certain amount of handicraft work, or have been content to come each day on to the land to work either for the Oil Company or for the Government. Governmental policy, however, is aimed at inducing these people to leave their river homes and to become peasant cultivators on the land. Meanwhile, however, their river communities, known as *kampongs*, continue to exist. Within a *kampong* area each man owns the house which he has built for himself and his family, and on his death the house will normally pass to another member of his family. He cannot, however, sell it to a nonmember of the group, for that nonmember would not be allowed to enter the *kampong* community unless he is approved by the group as a whole. An arrangement of this kind does not square with the provisions for acquiring title under the existing Land Code, and in consequence, the *kampong* communities are not noted on the district registers. Theoretically, therefore, those who dwell in these communities have no legal entitlement to do so, but of course, no Government would or could endeavor to enforce the strict legal position.

The district registers themselves gave rise to a number of problems. Their form was set out in the original legislation, and it is true to say that the register of grants of land resembles not so much a register of titles as a landlord's rent register. Transactions in landholdings were registered in a different book and a cross-entry was made from one book to the other. Any inaccuracy here would, of course, lead to confusion. Moreover, it is only recently that an accurate survey has been carried out within the State, and many people who have been granted title by means of an entry in the district register were actually occupy-

ing land which differed from that comprised in the paper title. This was well known to all concerned, but it increased the ineffectiveness of the registers.

Furthermore, owing to the slow progress of the survey, a considerable time was likely to elapse between the making of an application for grant of land and its approval on the one hand and the completion of the survey of the land to be granted on the other; the survey was a prerequisite to the entry of the grantee's title in the district register. The delay between the approval of an application and the making of an entry in the district register was normally for a period of months and might well extend to several years. Strictly speaking, until the entry in the district register had been made the applicant had no title to the land. In practice, however, once approval of his application had been given he might tacitly be permitted to occupy the land and he might well proceed to develop it, although the Government, in giving the approval, was usually careful to tell him that he ought not to enter into occupation until the entry in the district register had been made. Nevertheless, persons whose applications had been approved were regarded by the public at large as landholders and were able to obtain mortgages or make transfers on the faith of the approved application. None of these transactions had any strict legal effect, but they continued to take place and in some cases the Government itself was a party to such transactions. Thus there was a complete divergence between the legal position and the practice as regards landholding and transactions in land. In some cases insufficient care was taken by the District Registrars in collating applications for land, with the result that in a number of instances two people have at different times applied for a grant of the same piece of land and have had their applications approved. In one case which came to the writer's notice, there were seven approved applications in respect of the same piece of land which, being surrounded on all sides by other land already granted, was clearly identifiable. The first six applicants had heeded the injunction of the Government not to attempt to occupy the land until the entry in the district register had been made, but the seventh had gone into occupation and built a house upon it.

Finally, the practice of the District Registrars varied. There was no rule which governed the District Registrar in his decision whether to grant a perpetual holding or one for a term of years, or which guided him, should he decide upon a term of years, as to the length of the term which he should fix. There was thus considerable divergence between the four areas covered by the separate registers, and one of the registries operated under the handicap that, although its books were kept in the district registry, the master plan (to which reference was made in all the entries) was kept at Brunei, which was some distance away. This meant further delay in the registration of dealings with landholdings.

These were the main problems which confronted the writer during his discussions with the Brunei Administration. It was in those discussions agreed that the solution would be to remodel completely the land law of the State, as the

existing situation allowed this to be done without causing undue hardship. It was therefore necessary to devise a scheme which would serve as a basis for the new land law.

II

The first problem which had to be settled was what should be the nature of a holding in land. Should the landholder have what is known to the common law world as an estate in the land, based upon the theory that absolute ownership is reserved to the Sultan (in his official capacity), or should each landholder have *dominium* over his holding, subject to such restrictions as might be laid down in the new Code? The former system was adopted for two reasons. Firstly, the Courts which would have to settle land disputes would, at any rate for some time, be staffed by members of the British Overseas Civil Service, who would have been trained in English law, so that the "estate system" would be more familiar to them. Secondly, it was felt that the native landholder would more readily recognise restrictions upon his rights to deal with the land if it were made clear to him from the outset that he held as a tenant of the Sultan. For this reason, too, it was decided temporarily to retain the system of requiring landholders to pay an annual rent, although, in many cases, the amount fixed as rent would hardly be worth the trouble of collection. Economically, as the writer pointed out, if revenue from landholdings was required it would be simpler to impose a tax on landholdings, the rate of which could be varied according to the requirements of the economic situation; but it was decided not to proceed in this way because of the dislike of the populace for anything in the nature of a land tax.

Having decided that landholding would be effected by the grant of estates, the next question was to settle the kind of estates which could be granted. After some discussion with both the civil and religious authorities, the following plan was evolved.

Part of the country would be held under either perpetual or fixed term estates.[5] In each case the holder would be required to pay a rent and to observe conditions fixed at the time of the grant to him. These conditions would normally govern the manner in which the land was to be developed. The estate was to give him a right to use, occupy, and enjoy the surface[6] of the land and its fruits either in perpetuity or for a term of years. He could transfer, mortgage, or otherwise deal with his estate as he chose.[7] On his death, the land would pass

[5] Corresponding broadly to the fee simple and the term of years.

[6] During the many discussions on the drafting of the Code, the writer resolutely refused to attempt to define the term "surface." To the question "how deep is the surface?" he gave the reply "as deep as it has always been since the first Land Code was introduced." Admittedly the term is a vague one, but it is not likely to cause difficulty in practice, and its employment without definition gives the Court room to mold the law to different fact situations as they arise.

[7] The old Code and the new draft restrict his right to transfer the land to a non-native of Brunei except with the approval of the Sultan-in-Council. This, however, is a minor exception to the general principle. The restriction, which was first imposed during the early part of the present decade, was retained for political reasons.

either as directed by his will or in accordance with the laws of inheritance applicable to him (under his personal law) should he die intestate. This at once raised the problem of the possible fragmentation of estates arising from the Muslim system of inheritance, which has already been mentioned. In order to overcome this, the notion of the statutory trust was borrowed from the English land legislation of 1925.[8] Under these provisions, whenever an estate becomes or would become held in undivided shares it is by the Code vested in trustees who hold it upon trust for sale. The trust is not to be carried out by way of sale without the consent of the Court, and in the meantime the persons beneficially interested are to be permitted to enjoy physical possession of the land. If a sale is effected, the proceeds are held upon trust for the persons whose undivided shareholdings would have given them beneficial interests. Provision was made for the resolution of disputes by the Court, and also for enabling the Court to require one beneficiary to sell his interest to another (so that there might not be too many beneficiaries interested if it were desired to work the land efficiently and to obtain a mortgage upon it).

The existence of these freely alienable estates would invite the concentration of large landholdings in individual hands. A small peasant holder would be likely to get himself mortgaged "up to the hilt" (or even beyond!) and to find his mortgage foreclosed within a very short space of time; and apart from this he could easily be tempted to sell his holding for the comparatively high price which would be likely to be offered to him during the present time of economic plenty resulting from the oil boom. Such arrangements would cut across the declared Government policy of encouraging peasant landholding, and some system, therefore, had to be devised to protect the peasant landholder against himself. Recourse was accordingly had to a system based partly upon Muslim law and the customary law of the Brunei Malay, and partly upon ideas of tenure derived from early English legal history.

In brief, a new kind of estate was introduced, termed a *pesaka* estate. This may best be likened to an unbarrable entail. The *pesaka* estate descends from its original owner to those entitled under the appropriate personal law to inherit from him, from generation to generation. If two or more persons are entitled to inherit they will take in undivided shares and those shares will be inheritable in the same manner. But no dealing in or alienation of a *pesaka* estate or of an undivided share therein is permitted, save that an owner of an undivided share in such an estate is permitted to alienate it to a person who himself already owns another undivided share in that estate.[9]

It was, of course, realised that the introduction of estates of this kind might rapidly lead to stagnation. If a *pesaka* estate cannot be mortgaged, how can its owner provide himself with the necessary machinery etc. to work the land adequately? Here it was possible to find a solution stemming from the favorable financial position of the Government. The new Code expressly permits the

[8] Law of Property Act, 1925 (15 Geo. V c. 20), sections 34, 35.

[9] This exception was introduced to encourage interfamily dealings with a view to avoiding excessive fragmentation.

mortgage of a *pesaka* estate to the Government and provides that in default of payment the estate may be foreclosed and the land regranted to a new holder by the Government. This gives a measure of security to the Government, although admittedly a provision of this kind is mainly *in terrorem*. The Government, however, is willing to use its surplus revenue to encourage peasant landholders and to risk losing its money in a few instances.

If the time should arrive when the family of an original *pesaka* estate owner should die out so that there is no one left to inherit, the estate automatically comes to an end, and the land becomes available for regrant by the Government.

Having thus disposed of individual holdings, some provision had to be made for the semi-communal type of holding which exists in the *kampongs* described above. The solution here was to permit the Sultan-in-Council[10] to designate areas as *kampong* areas and also to recognize those *kampong* areas which currently existed. Within a *kampong* area, the Sultan's writ does not run, at any rate so far as land questions are concerned. The government of the whole area is vested in the Chief Headman of the area and a council of his advisers (Headmen) appointed by the Sultan-in-Council.[11] No person is permitted to acquire any estate in land within a *kampong* area, or to enter into occupation or possession of land within such an area, without the consent of the Headmen. Some modification of these general principles had, however, to be introduced to accord with current practice. Some owners of houses in *kampong* areas have borrowed money from the government on the security of those houses, with a view to improving their construction and enabling their owners to set up in some form of trade. This practice was recognized by permitting a person lawfully owning a house[12] in a *kampong* area to mortgage it to the Government. And again the Government was given some *in terrorem* powers, being enabled to sell the house in default of payment but only to a person whose occupation thereof is approved by the Headmen.

The next main question was what to do about the registration system which existed. It was decided to abolish the existing district registries and to replace them by a central registration system of the Torrens type which has worked successfully in Australia and in some other jurisdictions.[13] It may here be mentioned that some type of registration system is essential in Brunei if the authorities are to keep track of landholdings and if frequent litigation is to be prevented. Apart from those in the Government service, there are no lawyers practicing in the State, and in the absence of a registration system it would be difficult for the landholder to carry out effectively his transactions in land.

[10] I.e., the Sultan acting after consultation with his political Council.

[11] In practice he would act upon the advice of his District Officers in making these appointments.

[12] Not land—the distinction was carefully drawn.

[13] Some of the administrators in the Brunei Government come from Australia and are familiar with the general nature of this system, so that its introduction was unlikely to create great problems.

Moreover, whatever may be said on the desirability of introducing a title registration system into a developed community, there is almost no argument which can be advanced against its introduction into a community which is largely undeveloped and in which only a very small proportion of the land is currently under individual ownership.

The next step was to remodel the system of governmental acquisition of existing holdings. This was effected by repealing the old system, which appeared to introduce a great deal of delay into an acquisition without giving any effective protection to the individual owner, and replacing it by a new system giving to the Government the same general powers of acquisition but at the same time giving a right of challenge to a proposed acquisition by an individual owner on a number of specified grounds.[14] The compensation provisions which formerly existed were largely embodied in the new Code, but were redrafted in order to tighten them up at certain places where difficulties had appeared in practice.

Lastly, it was decided to write into the new Code a scheme empowering a system of town and country planning to be put into force, should this be desired. This scheme was on lines which are generally familiar to the common law world, and the only point at which difficulty arose was that of deciding on what rights should be given compensation for loss resulting from the making or implementation of planning schemes. The general principle, which was of course worked out in considerable detail, was that no owner should be entitled to compensation as a result of the impact of a planning scheme upon his estate, except that money which he had already expended *bona fide* in developing the land was to be recouped to him if the result of the planning scheme was to render his expenditure abortive.

III

After the writer had agreed on these general principles with the Brunei Government, he returned to the Melbourne Law School and drafting was at once begun. For this purpose a small committee of four was formed from members of the full-time Faculty. The task of producing the greater part of the first draft fell upon the writer. The committee then met over several weeks and discussed every provision of the draft in the minutest detail. It may be said that the final draft which emerged from these discussions differed very greatly from the first draft. This was only to be expected, as each member of the committee was able to present problems arising from his own experience in his own particular field, which called for an amendment of the wording. The task of drafting the section dealing with registration was undertaken by another member of the committee who had a particular *expertise* in this field. A fifth member of the Faculty undertook the task of drafting a Land Tax Enactment in case the Brunei Government should decide to sweep away the system of paying rentals for estates and replace it by a land tax system.

[14] All of the variations on the single theme, "abuse of power."

It is, of course, not possible to set out here the details of the many problems which arose in the preparation of the draft. Reference may, however, be made to some of the more important points.

At the outset, the writer adopted certain general principles. At some points, where all the contingencies which might arise in the future could not easily be foreseen, the wording of the draft was deliberately made vague and imprecise in order that the court might have a free hand in molding the law to deal with new sets of facts. At other points, where the future could be foreseen, the wording was made as precise as the four minds of the committee could make it. For example, as there are no lawyers in the State, detailed provisions, precisely worded, were included to govern the implications which would arise on the making of a simple transfer of an estate.

Again, since it was desired that the court should treat the new Code as embodying a new system of law intended to be peculiarly suitable to the needs of Brunei, a conscious effort was made to avoid the use of words which have acquired a well recognized meaning in the common-law world. Thus the new draft speaks of "obligations" incident to estates rather than of "conditions"; it refers to "inheritors" rather than to "heirs" or "next of kin"; and so on. Moreover, at all times the writer had to bear in mind that, for the purpose of enacting the draft, it would have to be translated into Malay and its language had therefore to be made as simple as possible.

The section dealing with registration also presented peculiar problems. The Torrens system has been the subject of much judicial exposition in Australia, and as a result, it has lost some of its original force. Its designer intended that the register should be conclusive evidence of title and that, except as provided in the system itself, equities acquired by occupiers and other persons should be disregarded. The courts, however, have in the past disregarded this, with the result that there is now a divergence between the apparent language of the Torrens system statutes, as enacted in the various Australian States, and their administration in practice. Special provisions were inserted with a view to avoiding a recurrence of this situation in Brunei.

The transitional provisions governing the changeover from the old system to the new were, of course, difficult to work out in view of the confused situation which at present exists. Some of the more obvious problems were dealt with, but in general the Registrar was given a fairly free hand, subject to directions which he might be given by the Sultan-in-Council. Moreover, power was given to the Sultan-in-Council to modify the transitional provisions by regulation, for the purpose of overcoming any anomalies which might arise in practice.

Finally, provision was made for the creation of a new jurisdiction termed the Lands Tribunal of Brunei. This court is to consist of a permanent Chairman, who will probably be appointed from among the judges of the existing courts. He will normally sit alone, but in questions where a religious or personal law is involved he will sit with and be aided by assessors competent to advise him on these questions. He is also given power to refer questions of Muslim law to the Muslim courts which exist in the State.

By the creation of this new Tribunal, it is hoped that there will be a permanent court, dealing with all land problems in the State, which will rapidly acquire an *expertise* in the matter and develop its own jurisprudence as occasion demands. Specifically, a clause was inserted directing the Tribunal to deal with cases which do not appear to be covered by the provisions of the Code either by analogy from those provisions or in a manner consistent with the general scheme of the Code and, in particular, without regard to the rules of law or equity prevailing in any other jurisdiction.

IV

The foregoing is a brief account of the drafting of the new Brunei Land Code. It only remains to add that the task of drafting was completed within the self-imposed deadline of three months. The draft was then submitted to the Solicitor-General, the Parliamentary Draftsman, and a representative of the Registrar General of Titles, all of Victoria. These officials very graciously considered the draft in detail and submitted their comments. It may be said that these comments were very few and of a minor nature only.

The completed draft was then forwarded to the Government of Brunei, and after time had elapsed for its consideration, the writer visited the State in company with the Dean of the Law School for final discussions. Once more the whole draft was discussed in minute detail, but again such changes as were made were only of a minor nature. The task of translating the draft into Malay has been going forward, and it is understood that the draft will come before the Sultan's Council for enactment soon. It will thereafter be submitted to the ultimate test—that of time.

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DECISIONS

SWITZERLAND: FOREIGN EXPROPRIATIONS IN SWISS LAW—I. In the case of *Stransky v. Zivnostenska Banka*, appealed from the Obergericht in Zurich, the Zivnostenska Banka had been until 1945 a private bank incorporated in Czechoslovakia. On October 27, 1945, while Benes was still President of the Republic, the bank was nationalized, according to the socialist principles of the Prime Minister Fierlinger.[1] For about four and a half years, the bank, although it belonged to the Czech state, retained its personality, but it was finally merged, with other nationalized banks, in a state-bank, by a statute of March 9th, 1950, effective on April 1st of the same year.[2]

[1] Federal Tribunal, June 22, 1955, 81 B.G.E. (1955). I, p. 222ff.

[2] *Cf.*, for these circumstances, another federal case where the same bank was plaintiff: 79 B.G.E. (1953). II, p. 87ff., January 23, 1953, Zivnostenska Banka v. Wismeyer. In this case, the legal personality of the bank was the principal question.

Friedrich Stransky was a Czech citizen. He left his national country in 1938 and acquired a domicile in Zurich (Switzerland) in March, 1939. His assets included a deposit at the Zivnostenska Banka. After the end of World War II, Stransky tried to obtain restitution of his Czech property. Direct restitution from the bank proved impossible, because consent of the National Bank was necessary but this was not to be had. Therefore, Stransky sought to recover out of credits due the Zivnostenska Banka[3] in certain Zurich banks, by way of attachment (November, 1948). The bank's opposition to this proceeding was provisorily overruled. Consequently, Stransky was defendant in the ensuing suit by the Zivnostenska Banka, which the bank brought to show the tribunal in Zurich, the *forum arresti*, that it owed no debt to the other party (February, 1949).

In this proceeding, the Treaty concluded on December 22, 1949, between Switzerland and Czechoslovakia furnished the bank with a very convenient argument.[4] This was one of the numerous treaties negotiated by Switzerland with the East European powers (Yugoslavia, September 27, 1948; Poland, June 25, 1949; Hungary, July 19, 1950; Rumania, August 3, 1951; Bulgaria, November 26, 1954). By the Treaty with Czechoslovakia, in consideration of a lump sum of 71,000,000 Swiss francs (about $16,500,000.00), Switzerland waived all the private claims of its citizens that it had endorsed and, furthermore, agreed not to open its tribunals to any Swiss or Czech creditors or owners alleging certain categories of rights against the Czech State or other Czech public institutions.

On the basis of this Treaty, in spite of numerous objections raised by the defendant, the bank won its case in the lower court, and also before the Federal Tribunal on appeal. Here is the motivation:

1. The Treaty foreclosed the right of action of Swiss creditors or owners, and of creditors or owners who were Czech nationals at the time when the Treaty entered into effect, i.e., on January 1, 1950. It was established in the lower court through evidence which appeared flawless to the Federal Tribunal that Stransky, even after having left Czechoslovakia for about twelve years (1938–1950), had not lost his Czech citizenship.[5] P. 228–230.

2. Notwithstanding some small divergences in the text of the Treaty, the lower court had correctly concluded that Czech owners or creditors had for-

[3] It is true that before 1950 this was subject to controversy. These assets in Zurich probably still belonged to the previous shareholders of the Zivnostenska Banka, who had not received the least compensation (*cf. infra*, II A(b) *in fine*). For the effect of the Treaty of 1949 on this point, *cf. infra*, under II B.

[4] Signed in Prague, December 22, 1949 (Amtliche Sammlung der Bundesgesetze und Verordnungen, 1950, p. 21); Federal Council's report to the Federal Assembly, February 17, 1950 (Bundesblatt, 1950. I, p. 496); Federal Assembly's Act of approbation, March 29, 1950 (Amtliche Sammlung, 1950, p. 279); Federal Council's ratification, and exchange of notes, April 27, 1950 (Amtliche Sammlung, 1950, p. 394); entered into effect (under subsequent condition) January 1, 1950.

[5] Hungarian citizenship (*cf. infra*, under II B) was negatived in a parallel case, 52 Bl.Z.R. (1953), No. 76, p. 130–131, September 16, 1952, in re V., Obergericht Zurich.

feited, from January 1, 1950, exactly the same rights as Swiss owners or creditors, including the claim for restitution which Stransky had brought before the Swiss tribunals (Art. 5 2° a; 6 I; 2 III of the Treaty).[6] P. 226–227.

3. The Treaty applied not only to proceedings started after January 1, 1950, but also to proceedings then in litigation. These had to be stayed, and the suits dismissed.[7] P. 230–231.

4. Vainly did Stransky seek to suggest that the Treaty contravened Swiss public policy, as far as *he* was concerned. There was no question that it did not, at the time it was concluded. But even later (in 1953, namely during the proceedings), when Stransky's claim was itself confiscated in Czechoslovakia (which is to be distinguished from the nationalizing of the Zivnostenska Banka), and therefore he became practically remediless,[8] the Federal Tribunal declared that it was the concern of the Government (Federal Council), not of the Court, to invoke a possible *clausula rebus sic stantibus*. P. 231–232.

II

In itself, this case is scarcely subject to criticism. The Treaty being what it actually is, the Federal Tribunal had no alternative but to decide in favor of the plaintiff (the bank) and to deny the defendant's right to restitution.[9] Nevertheless, the decision provides an occasion to review, in a few paragraphs, (A) the Swiss position regarding foreign expropriations and confiscations, and (B) the meaning of the treaties.

A. It may fairly be said that three different lines of thought direct the Swiss judges in their decisions:

(1) On the one hand, they try to be as realistic as possible, and do not discuss the acts of foreign sovereigns within the limits of their effective power;

(2) On the other hand, they seek to defeat foreign measures of a confiscatory nature (expropriations or nationalizations without proper compensation);

(3) When, as may occur, a confiscation or spoliation impairs private interests (double payment or no payment, for instance), an attempt is made to give a concrete solution to this clash of conflicting rights, according to the circumstances of the case.

(a) The old principle, that rights in things are governed by the *lex rei sitae*, pervades the Swiss case law on conflicts of laws.[10] From this principle, the

[6] *Cf.*, in the same affair Stransky, the Federal Tribunal's decision on the civil appeal (as opposed to the public appeal), 81 B.G.E. (1955). II, p. 79ff. (Appeal rejected for incompetence of the Federal Tribunal as a civil court).

[7] *Cf.* in re V. case (Zurich, 1952, *supra*, footnote 5), p. 129–130.

[8] Reserving the possibility of suing the bank in a third country where it had assets, and where there was no such foreclosure as in Switzerland. *Cf.* 8 Schweizerisches Jahrbuch für Internationales Recht (hereinafter S.J.I.R.) (1951), p. 190.

[9] On the apparent discrepancy between the Stransky case and a decision of the Bezirksgericht Horgen, 1952, *cf. infra*, footnote 38.

[10] See, recently: 74 B.G.E. (1948). II, p. 228, October 28, 1948, Firma Wichert v. Wichert; 75 B.G.E. (1949). II, p. 129, March 3, 1949, Gordon v. Republik Ungarn; and the Ammon case (quoted in the text), p. 60.

courts have deduced, as have the tribunals of many other countries,[11] that a foreign state can rightly expropriate, or even confiscate, things or rights which are located inside its territory.[12] Conversely, expropriations or confiscations involving things or rights which are located outside its territory are not recognized in Switzerland.[13]

Now, we would suggest that, in order to be recognized in Switzerland, the expropriation or confiscation effected by the foreign State inside its territory must be *complete*. This means that the legislative or executive act or decree of expropriation or confiscation is not sufficient in itself; it must be followed by effective realization, as by official seizure of the tangible thing (movable or immovable) or payment by the debtor to the state, or to the third person to which the state has transferred the right, etc. Only when the expropriation or confiscation

[11] D. Schindler, "Besitzen konfiskatorische Gesetze ausserterritoriale Wirkung?" 3 S.J.I.R. (1946), p. 71ff.

[12] In the United States, the corresponding "rule of decision," or "act of state," doctrine seems to have been based, at least by Mr. Justice Holmes, on another old principle: the application of the *lex loci delicti commissi* to wrongful acts, American Banana Company v. United Fruit Company, 213 U.S. 347 (1909), at p. 356. *Cf.* Edward D. Re, Foreign Confiscations in Anglo-American law (New York, 1951) 71. But here the word "confiscation" has a more general meaning. It appears to involve not only seizure of things and rights, but all types of injury to person and to property (e.g.: refusal to grant a passport, confinement and assaults, in the leading case Underhill v. Hernandez, 168 U.S. 250 (1897), Re, *op. cit.*, 61).

For the act of state doctrine, as understood by a Swiss author, see W. Schaumann, "Ausländische Konfiskationen, Devisenkontrolle und Public Policy," 10 S.J.I.R. (1953), p. 131ff.

[13] Here are some cases in which this principle has been applied (not always, it is true, as the only ratio decidendi):

43 B.G.E. (1906). I, p. 156, February 13, 1906, Rey et consorts v. Jaccard et consorts. The winding up of the Congrégation des Pères Chartreux, in France, has no effect on things and rights located in Switzerland.

50 B.G.E. (1924). II, p. 58, April 1, 1924, Weixler et consorts v. Société des Transports Internationaux. The wartime liquidation of the company's assets in France (owing to the fact that almost half of the shares belonged to German and Austrian citizens) does not influence the winding up of the company in Switzerland.

27 Bl.Z.R. (1928), No. 96, p. 178, March 11, 1927, In re Bachert, Obergericht Zurich. The official receiver appointed in England (*cf.* Enemy Amendment Act, January 17, 1916) cannot recover a claim located in Switzerland.

39 Bl.Z.R. (1940), No. 95, p. 196, March 1, 1939, in re Th., Obergericht Zurich. *Idem* for the official administrator (Kommissarischer Verwalter) appointed in Austria by the Germans.

Wichert case (*cf. supra*, footnote 10). Movables brought into Switzerland by Wichert *before* the seizure of his enterprise in Czechoslovakia escape seizure.

49 S.J.Z. (1953), p. 343, January 8, 1952, in re Prybil, Bezirksgericht Horgen. Claim against a Swiss firm (on an agreement to sell) was not involved in the confiscation of the creditor's assets in Czechoslovakia.

51 S.J.Z. (1955), p. 159, March 15, 1955, in re Koh-I-Noor, Federal Tribunal. The previous shareholders of the Koh-I-Noor Company are entitled to use the trade-mark in Switzerland, despite its confiscation in Czechoslovakia (but the motivation is not clear). *Cf.* the second Koh-I-Nor case, Sept. 13, 1957, 83 B.G.E. (1957) II. p. 312.

82 B.G.E. (1956). II, p. 196, September 25, 1956, in re Vereinigte Carborundum- und Elektritwerke. Same question, same answer: confiscation in Czechoslovakia of a trade-mark registered in Switzerland held ineffective in Switzerland. *Compare* 52 S.J.Z. (1956), p. 318.

has become a *fait accompli*, is recognition by the Swiss tribunals necessary.[14] This distinction between complete and incomplete acts of foreign Sovereigns seems to be supported by comparison of two recent federal cases, the *Elkan* case and the *Ammon* case.

In the first case, *Schweizerische Lebensversicherungs-und Rentenanstalt v. Elkan*,[16] Elkan had taken out a life insurance policy, in 1931 in Munich, with the German *filiale* of a Swiss insurance company. In June, 1942, he was sent to a concentration camp, his property confiscated, and the Swiss *filiale* ordered to pay the "purchase value" (*Rückkaufswert*) of the policy to the Nazi government, which was done, any resistance being obviously out of the question. Elkan survived the war and, in 1949, filed a suit against the Swiss insurance company, asking for recognition of the existence of his rights based on the policy. The suit was dismissed (more exactly remanded for a probable dismissal) by the Federal Tribunal, on the ground that the plaintiff's claim had been extinguished. Not only had it been confiscated, but payment had been performed by the defendant. Public policy was, a priori, powerless to deny the effects of an act which had been effectively realized.

In *Ammon v. Royal Dutch Company*,[16] Ammon had bought in 1946, at the Bourse of Zurich, four shares of the Royal Dutch Company. Those shares, among others, had been taken away from their previous owners by the Germans during the war, and placed on the market. After the war, the Dutch Government started proceedings to recover the stolen shares and, if possible, to obtain their restitution to the previous owners. One of the measures was to forbid the Royal Dutch Company to pay any dividend on certain suspect shares, among them Ammon's shares. This, in a way, amounted to a confiscation of the said shares. But such confiscation was not final. The payments were only stopped for the duration of the recovery procedure. Then they would start again, if Ammon could prove his good faith. In other words, the Dutch Government did not intend to extinguish his rights entirely, but to paralyze them momentarily (better: conditionally). Therefore, the Federal Tribunal not being confronted with a complete confiscation, the question of compliance with the Swiss public policy arose. This was affirmed, in the case at bar, but only a posteriori, after thorough examination of the circumstances (p. 65–70).

(b) We have seen that, for practical reasons, Swiss tribunals do not review, even from the standpoint of public policy,[17] completed acts of a foreign sovereign

[14] *Cf.* also Mr. Seidl-Hohenveldern's leading book, Internationales Konfiskations- und Enteignungsrecht (Tübingen, 1952) at p. 40.

[15] 79 B.G.E. (1953). II, p. 193ff., March 26, 1953.

[16] 80 B.G.E. (1954), II, p. 53ff. February 2, 1954.

[17] In some cases, nonrecognition of foreign acts was exclusively based on a violation of Swiss public policy. *Cf.* especially, 68 B.G.E. (1942). II, p. 377ff., December 22, 1942, Böhmische Union Bank v. Heynau, where the facts were similar to those of the Prybil case (Horgen, 1952, *supra*, footnote 13). But it is clear that this reference to the notion of public policy was entirely superfluous. See W. Niederer, "Einige Grenzfragen des ordre public," 11 S.J.I.R. (1954), 96–97. The role of public policy should be restricted to the case where

affecting things or rights located within its borders. However, at the same time they do not forget their fundamental dislike for some sorts of acts, namely, expropriations or nationalizations without proper compensation (confiscations or spoliations). They observe this second principle by limiting to the utmost the effects of the first principle. And they apply this limitation in elaborating a convenient notion for the location of things or rights.

As has been shown recently by a leading internationalist,[18] the location of a thing does not mean much; it is a most malleable conception. This is obvious for so-called intangible things (rights). But even tangible things have no indisputable location. Here indeed, rather than the thing, the right in the thing is at stake. Now, where is a right situated? The answer seems to be: in every state that is willing to protect it, which may mean in many states, e.g., at the domicile of the debtor, the place where the debtor has attachable assets, etc. And we must bear in mind that, when a right is directed to a thing, the debtors are, virtually, innumerable and indefinite.[19]

Of course, even if a right has many locations, some of them, or one of them, may be more important than the others.[20] As to the rights in tangible things, it is clear that they are most effectively located in the states where the things themselves are actually located. Such is undoubtedly the opinion of the Federal Tribunal.[21]

In this context, a point remains to be noted: the interference of time and space in the case of movables. What happens, when a tangible (movable) thing has been expropriated or confiscated in the state of its location and afterwards brought to Switzerland, irrespective of the reason? It is unquestionable that, if the previous expropriation or confiscation was not complete, and if it violates Swiss public policy, Swiss courts will not recognize it (thus, expressly, the *Elkan* case, p. 202). And if the expropriation or confiscation was complete? We do not know of any Swiss decision on this subject. But the almost universal opinion is for unrestricted recognition.[22]

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an expropriation or confiscation decreed by a foreign sovereign of things or rights inside its territory is not complete. If, however, Niederer advocates a more frequent use of public policy, *op. cit.*, p. 99, the reason is that he subordinates private to public international law, and ascribes to the tribunals a task which should traditionally belong only to the government (treaties of compensation).

As to the so-called principle of nonapplication of foreign public law, which seems to have had some success at the beginning of this century (*cf.*, for instance, 42 B.G.E. (1916). II, p. 183, April 17, 1916, La Nationale v. Biermann; life insurance policy), more recent decisions indicate that its content was borrowed from other principles (distribution of jurisdiction, competence of the *lex fori*, public policy; *cf.* Wismeyer case, *supra*, footnote 2, p. 95; Ammon case, quoted in text, p. 62; and also 45 Bl.Z.R. (1946), No. 74, p. 127, November 11th, 1942, in re Th. B., Obergericht Zurich, another case of "Kommissarische Verwaltung").

[18] W. Wengler, "Die Belegenheit von Rechten," Festschrift der Juristischen Fakultät Berlin zum 41. Deutschen Juristentag in Berlin (1955) 285–352.

[19] Wengler, *loc. cit.*, p. 293ff.

[20] Wengler, *loc. cit.*, p. 309ff.

[21] E.g. Wichert case (1948), *supra*, footnote 10.

[22] Seidl-Hohenveldern, *op. cit.*, p. 13, footnote 21. We do not think, however, that much

As to the converse hypothesis: It must be admitted that an expropriation or a confiscation of a movable which is outside the territory can become complete, if this movable is later brought inside the territory. In any event, this will be the case if the removal is *voluntary*.

Now comes the great difficulty, the solution of which could offer an escape from the rigidity of the territorial doctrine mentioned under (a): Where is a right that is not directed to a tangible thing, as a claim, for instance to be located? Or, more exactly, where is the place of its most effective location? Obviously not, in itself, the state whose law, according to Swiss private international law, governs the right.[23] In other words: this is a question of effectiveness only. Which state can best protect (or harm!) the right? Probably not the state where the *creditor* is domiciled; if the debtor has had no assets there, and no domicile, the creditor would be remediless.[24] The right will be far better protected in the state where the *debtor* is domiciled. Not so much because this is the place where the debtor can be imprisoned (this institution becomes more and more obsolete), but because it is a place where the debtor is very likely to have assets which can be successfully attached.[25] This last reason is after all the most convincing. Neither the creditor's, nor even the debtor's, domicile as such determines the location of a claim, but the place(s) where the debtor has assets.[26] With a qualification: this assumes that the state of the situation of the assets allows attachment. If it does not, then the location is at the domicile of the debtor.

Very often, a debtor owns assets in various countries, all of which offer a *forum arresti*. The consequence is clear: none of these countries protects the creditor's right so much more effectively than the others as to warrant exclusive

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can be inferred from Pettai v. Schinz, December 19, 1928, Obergericht Zurich, 28 Bl.Z.R. (1929), No. 140, p. 264, there cited. A claim to recover a loan was held inexistent because plaintiff and defendant were still domiciled in Russia at the time of the radical changes of 1917–1918. But the official opinion of the new regime, that every right created before November 7, 1917, was forfeited from that date, for the first time appears in an Act of October 31, 1922, when plaintiff and defendant had already left the country. Now, if a confiscation must be complete in order to be recognized (*supra*, (a)) it does not, a fortiori, admit retroactivity. Consequently, the claim in question had escaped the destructive effect of the new legislation. We cannot help feeling that the Zurich decision was inspired by considerations of expediency, of which the first might have been the Swiss nationality of the debtor as contrasted with the foreign nationality of the creditor.

[23] 16 Bl.Z.R. (1917), No. 196, p. 338, November 15, 1916, E. v. W., Obergericht Zurich. Lease of a building in Menton (France), governed by French law. The rent obligation is located in Switzerland, and the German creditor cannot be precluded from recovering by the French war legislation. But compare with Elkan case, *infra*, II A (c).

[24] *Cf.*, nevertheless, obiter dicta of the cases in re Th. (Zurich, 1939, *supra*, footnote 13), at p. 197–198, and Elkan, at p. 200.

[25] Prybil case (Horgen, 1952, *supra*, footnote 13), at p. 345.

[26] 40 B.G.E. (1914) I, p. 483, December 17, 1917, Guigue, Déchandon, Auclair et Cie v. Stromeyer. The decree of the French Government (September 27, 1914), sequestrating the rights of German creditors, cannot be opposed to the Stromeyer company as respects assets in Switzerland of the debtor, a French company. *Cf.* also in re V. case (Zurich, 1952, *supra*, footnote 5), despite the reference to public policy.

power over the right; none, therefore, is in position to expropriate or confiscate the right in a way which would be opposable to the other countries.[27]

The location of rights in things like trade-marks must be determined by different criteria. In common with rights in tangible things, the debtors are innumerable and indefinite. But, in contrast with the same rights, it is hardly possible to find their "most effective location."[28] The Swiss courts have apparently decided that registration in Switzerland of a trade-mark cannot be affected by a foreign expropriation or confiscation.[29] In other words, these so-called "rights in immaterial things" are conceived as located in each of the countries in which they are registered. The disputed principle of the dependence of the trade-mark is not applicable in cases of expropriation or confiscation.

Joint stock companies raise a somewhat particular type of problem. A distinction seems necessary between expropriation or confiscation of the assets of the company; of the shares; of the company itself. Expropriation or confiscation of the assets is a mere expropriation or confiscation of things.[30] When a foreign state seizes the shares, the previous distinction between complete and incomplete acts can be of some use. After all, what is here involved is not the share, but the rights in the share. Hence, the foreign state (or state institution) will not be recognized the least right to the assets of the company located in Switzerland, if the seizure of the shares contravenes Swiss public policy.[31]

Usually, however, the state will expropriate or confiscate the company itself. This means that the company loses its legal personality; the assets, often the name of the firm, are transferred to a state institution; the shares are cancelled. Let us assume that the company was incorporated in the expropriating state. Then the Swiss tribunals recognize the loss of legal personality. In the well-known case, *Hausner v. Banque Internationale de Commerce de Petrograd*,[32] could the Genevese *filiale* of the Banque Internationale be a party to a suit before the Swiss courts? This the Federal Tribunal negatived. The decision is explained by the theory assumed of the nature of the legal personality of a company: the state of incorporation confers and removes legal personality, and consequently the existence of the parent company. And a *filiale* has no existence of its own. As to assets located outside the territory of the state, they are, of course, not considered as seized, at least as long as no compensation has been

[27] Theoretically, quantitative differences between the various groups of assets ought to be considered. But then the problem becomes almost inextricable.

[28] Troller, however, thinks it possible to locate the trade-mark (not the right in the trade-mark, which, according to him, is not the object of the expropriation or confiscation) at the domicile of its titular. Internationale Zwangsverwertung und Expropriation von Immaterialgütern (Bâle, 1955) 104, 113–114.

[29] Rey (1906), Koh-I-Noor (1955 and 1957), and Carborundum (1956) cases, *supra*, footnote 13.

[30] Weixler case (1924), *supra*, footnote 13.

[31] Seidl-Hohenveldern, *op. cit.*, p. 128.

[32] *Cf.* also 51 B.G.E. (1925) II, p. 264, July 13, 1925, Wilbuschewitz v. Waisenamt Zurich; 55 B.G.E. (1929) I, p. 291, October 26, Erben Prochorow v. Obergericht Zurich; and the Wismeyer case (1953), *supra*, footnote 2, at p. 91.

paid. Then, to whom do they belong? Not to the defunct company, but to the shareholders of the company. Assets located in Switzerland will be placed under administration, wound up, and, after satisfaction of the creditors, the balance, if any, distributed among the shareholders.[33]

(c) Application of principles may lead to hardship. It is well known that, in order to avoid such hardship, the courts sometimes depend more on the particular circumstances of the case than on rules of a general nature. The *Elkan* case provides an example. Reference was made above to that case, in contrast with the *Ammon* case, to show the difference between a complete and an incomplete expropriation or confiscation. Now, the facts were slightly different: Elkan's claim against the insurance company was not located exclusively in Germany, but in Switzerland as well, where the company had its principal office, and part of its assets. Then, if the rules stated under (b) are correct, why did the Federal Tribunal come to the conclusion that the German confiscation of the "purchase value" should be recognized? This involved the following dilemma: either to condemn the defendant company, or to remand the case for a probable dismissal of the suit. In the first alternative, the company would have to pay the same sum twice; in the second alternative, the plaintiff would not be paid at all. Solomon might have divided the loss in two halves.[34] Instead, the Federal Tribunal tried to determine whether the plaintiff or the defendant should bear the risks of double payment or no payment. To tell the truth, the solution in favor of the defendant is poorly motivated (p. 202–203).[35] "The defendant could not resist the order of the German Government." Neither could the plaintiff be rendered justice in Germany. "According to German internal law, which governed the rights based on the insurance policy, the payment had extinguished the debt." But what a strange idea to evaluate *lege causae* the act of the state of the *lex causae*!

Other reasons would have made more sense. For instance: A judgment against the defendant company would be followed by numerous suits of the same type, where the same solution should be repeated. This might prove a heavy financial burden for the insurance company, etc.

B. East European powers, after World War II, expropriated or confiscated many things and rights which they considered as located within their borders. Some of these belonged to Swiss citizens. In numerous cases (especially when rights—claims—had been seized), Switzerland could have disregarded the acts of the foreign states, owing to the presence within Swiss territory of assets owned by the debtors of such rights. (For the rather peculiar *Stransky* case, *cf. supra.*) But this would have meant a hostile attitude towards the foreign states and,

[33] Wilbuschewitz case (1925), *supra*, footnote 32, at p. 266; and Prochorow case (1929), *supra*, footnote 32, at p. 292–293. But see, for the case of an independent filiale, still existent after the nationalization of the mother company, 52 S.J.Z. (1956), p. 318, January 30, 1956, in re Berndorf-Krupp, Handelsgericht Aargau.

[34] Possibly also Wengler, *loc. cit.*, p. 341.

[35] Here again, we hope that the "nationality" of the parties had no bearing on the decision. *Cf.* also *supra*, footnote 22.

consequently, would have destroyed any hope of compensation to the Swiss owners and creditors. The eastern expropriations would have turned into mere confiscations. It was more advisable, therefore, to undertake diplomatic negotiations. After many months of hard bargaining, accords were reached, and treaties signed. For a lump sum, to be distributed among Swiss owners and creditors,[36] Switzerland agreed to consider the eastern expropriations as fully settled. This involved giving these expropriations extraterritorial effect. And this even when they did not concern Swiss citizens:

For instance, assets of the Zivnostenska Banka in Zurich were now admittedly owned by the new state institution and no longer (as might well have been judged before 1950) by the previous shareholders;[37] this is clearly in derogation of the principles referred to under A (a) and (b).[38] Similarly, two of the treaties, namely, with Czechoslovakia, art. 2 III, and Hungary, art. 3 III,[39] included a most criticized section, according to which citizens of the expropriating or confiscating state were barred from the Swiss tribunals as respects the losses which resulted from expropriations or confiscations in their national country. So were Swiss citizens. But they would share in the distribution of the lump sum to be paid to Switzerland, while Hungarian and Czech citizens would not.

The insertion of this "not very nice" section[40] can be explained only by political motives. The legal justification that the Federal Council tried to give is not convincing.[41] First, it is not sure that the suits that Hungarian and Czech citizens, but for the clause, might have brought before Swiss judges would have lacked any connection with Switzerland. Was the presence of assets belonging

[36] For the procedure of distribution, and the powers of the special commission appointed for the purpose, by the Federal Council (July 13, 1948), *cf.* R. L. Bindschedler, Verstaatlichungsmassnahmen und Entschädigungspflicht nach Völkerrecht (Zurich, 1950), at p. 87ff. (including a short comparison with the working of the American claims commissions). Parts of some Federal Council's reports on this subject are reproduced in 6 S.J.I.R. (1949), p. 128ff.; 7 *id.* (1950), p. 138 ff.

[37] A comparison seems possible with the effects of the Litvinoff assignment, as construed in United States v. Belmont (1937), 301 U.S. 324, and United States v. Pink (1942), 315 U.S. 203.

[38] In 1952, the Bezirksgericht Horgen (*supra*, footnote 13) negatived the application of the Treaty to the pending suit. But the disputed right could be safely considered as having had at the time the Treaty was concluded (1949), its principal, if not exclusive, location in Switzerland, where the debtor company had assets and head-office. Therefore, the Treaty did not extend to it. Differently in the Stransky case. The debtor (the bank) was "domiciled" in Czechoslovakia. And only by the Treaty did Switzerland recognize the new Zivnostenska Banka's ownership of the assets in Zurich. Consequently, at the time the Treaty was concluded, Stransky's right had its principal, if not exclusive location in Czechoslovakia. Therefore it was covered by the Treaty. It would have been not without interest to know whether, before 1950, Stransky could have obtained damages from the previous shareholders of the Zivnostenska Banka.

[39] On this last treaty, *cf.* in re V. case (Zurich, 1952, *supra*, footnote 5), and Bindschedler, 46 S.J.Z. (1950), p. 285–287.

[40] "Wenig schöne Bestimmung," Bindschedler, *op. cit.*, *supra*, note 36.

[41] Reproduced in 8 S.J.I.R. (1951), p. 190–191. Also Bindschedler, *op. cit.*, p. 95–96.

to the debtor not a sufficient connection? Second, it can hardly be said that these suits would have been based only on the public law of Hungary or Czechoslovakia and, as such, outside the jurisdiction of Swiss tribunals. That may be true, indeed, of the *compensation* claims. But Stransky's claim was precisely not a compensation claim. It was, at least until 1953, a simple claim to restitution of a deposit in a bank, which is, undoubtedly, governed by private law.

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PARKER SCHOOL SUMMER PROGRAM IN FOREIGN LAW

A unique experiment in American legal education took place last summer on the campus of Columbia University in New York City. This was a one-month program in foreign law for the benefit of lawyers who are interested in international transactions. The Program was conceived and was under the direction of the Parker School of Foreign and Comparative Law, which is one of the schools of Columbia University. The Program was held during the period of June 6 to July 3, 1957.

Nineteen men enrolled in the Program of whom twelve came from corporations and seven from law firms. They came from as far east as Austria and from as far west as Texas; their average age was in the middle thirties. One of them was a senior partner of a law firm and another the general counsel of a large chemical company. On the other hand, some of them had recently graduated from law school and were junior associates in either their law firm or their corporation.

The Faculty consisted of four persons. The major share of the teaching was done by Professor Henry deVries who is a Professor of Law in Columbia Law School and likewise a partner in the firm of Hyde & deVries in New York City. The other Faculty members were Professor Louis Baudouin of the School of Law of McGill University, James N. Hyde, Esq., of the firm of Hyde & deVries, and Victor Folsom, Esq., the Foreign Counsel of Sterling Drug, Inc.

The objectives of the Program were to give American lawyers (a) sufficient knowledge of the fundamental concepts and methods of the civil law to enable them to co-operate effectively with lawyers in civil law countries and to evaluate their advice, (b) sufficient acquaintance with foreign legal materials to enable them to distinguish between problems which can be handled at home and those which should be submitted to foreign counsel, (c) analysis of certain recurring legal problems of American business enterprise doing business abroad, and (d) understanding of the organization and functions of the more important international agencies, as the European Coal and Steel Community, which directly affect private international business operations.

In the teaching of civil law concepts and principles, primary emphasis was

given to the law of France. This is because French law has had a profound influence throughout Europe and South America. There was also the fact that the Faculty was more familiar with French law than with that of any other civil law country. Professor Baudouin is a French national who teaches civil law at McGill University. Professor deVries is a co-author with Professor René David of the University of Paris of a book in English on "The French Legal System" which will shortly make its appearance.

Instruction was by means of lectures and seminars adapted to the needs and language ability of the individuals composing the group. An assigned reading list was distributed at the start of the Program and the Columbia Law School library was kept open in the evenings and on Saturdays to provide ample opportunity for reading. Approximately eighty hours were devoted to classroom instruction during the course of the four-weeks' program. Somewhat more than half of these hours were directed to the exposition of the principles and methods of the civil law. The balance of the time was spent in discussing problems of doing business abroad and the operations of international agencies of importance to international business operations.

On the last day of classes each member of the group was given a questionnaire in which he was asked to evaluate various aspects of the Program. The replies received were most encouraging. All of the members thought that they had profited from the Program, that what they learned more than justified the time that they were required to be away from their offices, and that the Program should be continued in future years. Several of the corporations and law firms, from which the participants came, have also written to say that they were pleased with what was done.

In view of this encouragement, the Parker School of Foreign and Comparative Law intends to present a similar program next summer.

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Book Reviews

Minnesskrift utgiven av Juridiske Fakulteten i Stockholm vid dess Femtioårsjubileum 1957. Stockholm: P. A. Norstedt & Söners Forlag (1957). Pp. 298.

Scandinavian Studies in Law 1957. Edited by Folke Schmidt. Volume 1. Published under the auspices of the Faculty of Law, Stockholm University. Stockholm: Almqvist & Wiksell, 1957. Pp. 198.

The above works, which appeared on the occasion of the Fiftieth Anniversary of the Faculty of Law of the University of Stockholm in May, 1957, attesting the distinguished position attained by the Faculty within half a century, exemplify the unique and significant role of Scandinavian law in recent years in the evolution of the legal culture of Western Europe. The *Minnesskrift* is an elegantly printed volume, designed, as Professor Håkan Nial states in a brief foreword, to provide a survey by the members of the Faculty of the principal trends in the evolution of Scandinavian law and legal science during the past fifty years; the contributions cover the principal branches of private and public law, the field of national economy, and the history of the Faculty during this period. The topics thus treated, with the corresponding authors, include: criminal law and penology (Ivar Agge); modern Romanistic methods and their revival in Sweden (Jan Eric Almquist); immaterial rights, i.e., industrial property (Gösta Eberstein); international law (Hilding Eek); damage liability (Jan Hellner); public administrative law (Nils Herlitz); frontiers of public and private law concerning landed property (Seve Ljungman); contracts: from individualism to collectivism (Håkan Nial); labor contracts: legal sources (Folke Schmidt); trends in modern national economy (Ingvar Svennilson); legal security and control of administration (Ole Westerberg); origin and activities of the Faculty (Åke Hassler). As this brief indication will suggest, this review of modern trends in Scandinavian law during the past half century covers topics of wide general interest in other countries as well as in Sweden.

The second volume listed above, *Scandinavian Studies in Law 1957*, inaugurates a series that will inevitably attract much interest outside of Scandinavia. As the editor, Professor Folke Schmidt, remarks in the preface, while there has been constant interpenetration of legal ideas between Scandinavia and the great legal systems of Western civilization, both those based on Roman law and those based on the common law, it has too often been of a one-way character, since most Scandinavian legal writing has been in the vernacular and in consequence is not generally read. For this reason, this new series is particularly welcome; it is to reproduce each year in English a limited number of studies that have already appeared in the Scandinavian countries with such revision and additional explanations as may be requisite to facilitate understanding of the articles by those not familiar with Scandinavian legal traditions and institutions. While the yearbook is edited at Stockholm, the other Scandinavian faculties are also represented on a distinguished advisory committee,

an assurance if any be needed, that the selection, translation, and editing of contributions included in future issues will maintain the standard set in this inaugural volume.

In this six contributions are presented. The first is an incisive review by Professor Arnholm of the most comprehensive work thus far published by Professor Alf Ross, *On Law and Justice*, which appeared in 1953. Starting with a summary of the Professor Ross' way of legal thinking, certain problems of central theoretical interest are discussed: the concept "valid law," the nature of legal "norms," the significance of "valid law" to the courts, to the layman, and for legal science, the importance of official enforcement as a criterion of legal norms, etc. Among his acute observations on these matters, Professor Arnholm's criticism of the views that legal "norms" connote sanction by official agencies and that they are directed to the courts and only by indirection to the citizenry, as well as his concluding reference to natural law, challenge especial attention.

In the second article on "The Legal Character and Sources of International Law," Professor Gihl gives a comprehensive critique of the theories that have been advanced, since the decline of natural law, to establish a basis for the binding validity of international law, all of which appear inadequate. This appears a bootless search to the author, who proposes instead that international law is customary law; it is neither possible nor necessary "to find any 'foundation' for this law, whether in the will of the state or in any 'basic norm,' " to give it validity—it is sufficient to establish its existence by empirical means. From this viewpoint, the various "sources" of international law, conventional rules, usages, "general principles" of law, are reviewed as variously related to international custom.

Professor Grönfors' analysis in the third essay of the Apportionment of Damages in the Swedish Law of Torts deserves particular attention in common-law jurisdictions that have adopted the principle of comparative negligence for damage cases. It provides a concise yet comprehensive review of the policy considerations motivating the principle of comparative negligence, its intimate connection in Swedish legislation with the conception of fault as the basis for recovery of damages, the various standards applied in measuring negligence for purposes of apportionment of damages, and the special difficulties to which new forms of strict liability have given rise in apportioning damages. In the following essay, Professor Malmström gives a succinct and at the same time illuminating comparative summary of the development of the conception of children's welfare as the basic principle of the laws concerning parents and children; of special interest are the current extensions of the conception in modern legal systems to provide for illegitimate children and the recognition of claims on the ground of putative paternity.

The fifth essay is the ingenious fable, entitled *Tû-Tû*, originally published in the *Festskrift til Henry Ussing* (1951), in which Professor Alf Ross depicts the use of the expression *tû-tû*, which is apparently devoid of meaning, by a sup-

posititious primitive people, quite as such terms as "right," "claim," "ownership," etc., are employed in modern legal language. This parable serves as the basis to demonstrate that such terms usefully serve the two primary functions of language, to *describe* and to *prescribe*, even though it be conceded, as Lundstedt and others have maintained, that they do not correspond to any demonstrable reality. While this conclusion seems sufficiently persuasive as respects the functional value of generic legal concepts, one quails at the suggestion that the usefulness of such terms will still hold good, irrespective of what they signify—even if they stand "for nothing at all." It is difficult to see how this can be in the usage of terms relating to reality, unless at least their meaning does not vary in a sequence of propositions referring to a given context—even if *tû-tû* should be "nothing," it must refer to the same "nothing" to be useful in related verbiage! However this may be, the analysis will be of great interest to exponents of formal legal theory, and in particular to those acquainted with Lundstedt's views.

The final paper by Professor Folke Schmidt on Construction of Statutes deals with the much-discussed problems of legislative interpretation by asking what is the function of the courts in modern society and what principles guide the process of adjudication, rather than in terms of legislative purpose—"the teleological method." This leads to a most stimulating analysis of where judges, lawyers, and legal scholars are to look for guidance in determining the law, defined as what is permissible to the judge, that should or may apply in the application of a given statute to a case. Particularly instructive is the author's detailed description of the judicial process as actually operated by Swedish judges—their utilization of precedents and notably the relative significance of statutory texts and the legislative materials—all matter of particular comparative value in any consideration of this central legal question, the judicial process.

As these brief comments will suggest, the contributions in the initial volume of *Scandinavian Studies in Law* do more than reflect significant aspects of the Scandinavian legal scene. Each deals with a topic of wide current interest, on which the Scandinavian experience will be found stimulating, not to say illuminating, as a basis of comparison. The authors and editors are to be congratulated on projecting this new series, well-conceived and well begun, to make the outstanding contributions of Scandinavian legal science more generally available.

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Bibliographie der Geschriften van Prof. Mr. E. M. Meijers. Samengesteld door Prof. Mr. R. Feenstra, Prof. Mr. H. F. W. D. Fischer, Mej. Mr. M. E. Blok en Mr. F. B. J. Wubbe, etc. Leiden: Universitaire Pers Leiden, 1957. Pp. xxviii, 345.

MEIJERS, E. M. *Études d'histoire du droit.* Volume 1. Leyde: Universitaire Pers Leiden, 1956. Pp. ix, 286.

MEIJERS, E. M. *Verzamelde Privaatrechtelijke Opstellen.* 3 volumes. Leiden: Universitaire Pers Leiden, 1954, 1955. Pp. xii, 407; i, 409; ii, 343.

MEIJERS, E. M. *Ontwerp voor een Nieuw Burgerlijk Wetboek.* Tekst (2 Parts) and Toelichting (2 Parts). 's-Gravenhage: Staatsdrukkerij-en Uitgeverijbedrijf, 1954, 1955. Pp. vii, 184; iv, 5; 373; 375–451.

BAST, J. H. *Het Ontwerp-Meijers voor een nieuw Burgerlijk Wetboek vergeleken met de bestaande wetgeving.* Zwolle: N. V. Uitgevers-Mij. W. E. J. Tjeenk Willink, 1956. Pp. 413.

ASSER, C. *Handleiding tot de beoefening van het Nederlands Burgerlijk Recht.* Vierde Deel. *Erfrecht.* Bewerkt door E. M. Meijers. Vijde druk bijgewerkt door P. W. van der Ploeg. Zwolle: N. V. Uitgevers-Maatschappij W. E. J. Tjeenk Willink, 1956. Pp. xvi, 545.

The late Professor E. M. Meijers of Leiden for years prior to his decease in 1954 was the leading jurist of The Netherlands. He will be recalled by readers of this Journal as the author of the leading article, "The Benelux Convention on Private International Law," (vol. 2 (1953) 1); his distinguished career was memorialized also in this Journal by Professor J. Offerhaus of Amsterdam (vol. 3 (1954) 625–627). The works listed above are but a part of his many contributions relating to the civil law of The Netherlands and to the broader historical and comparative aspects of legal science, upon which his reputation primarily rests. In this brief notice, it is not possible to review these works in detail, but only to give intimations of their general character and interest for jurists outside of Holland.

In a comparative view of legal development in Western Europe, the legal system of the Netherlands is in certain respects of unique interest. In the 17th and 18th centuries, the period when the Roman-Dutch law was formed, the United Provinces were an advanced center of legal science, as indeed also of other branches of culture; among other things, during this period, the political relations of the Low Countries with the British Isles promoted the dissemination of civil-law influences from the Dutch universities not only in Scotland but even also in the adaptation of the English common law to meet the growing needs of commerce. In the 19th century, while the use of the vernacular in legal writing, commonly adopted in The Netherlands as in other European countries, contemporaneously with the conquest of the country by Napoleon followed by the separation from Belgium, tended in a measure to insulate Dutch legal science within narrowed frontiers, it continued on a distinguished level into the 20th century, cultivating an even wider range of legal materials —the civil-law background, notably as incorporated in the classic works of Grotius, Huber, the Voets, and their contemporaries, the indigenous streams of Germanic customary law, the French codified legislation as adopted in 1838, the developments of German legal science, and to a lesser degree even the English common law, not to speak of the law of Indonesia and indeed of public

international law in which The Netherlands has traditionally played a leading role. This is the setting that inspired Meijers' contributions, which they conspicuously reflect.

Their range and volume is indicated by the *Bibliographie*, published by the Leiden University Press (which was initiated by Meijers) in connection with the reproduction of the more important of his papers, as selected and arranged by the author before his death. These contributions here are listed in two chapters, including, respectively, his historical works and those dealing with the existing law. The first includes 103 titles, with 75 subordinate references to reviews, notes, and other publications of interest for legal history; these are classified under (1) general problems of legal history, (2) history of French law, (3) history of Spanish law, (4) history of Dutch, Belgian, and German law, (5) medieval Roman law, (6) history of private international law, (7 and 8) miscellaneous and necrologies. The second chapter on "Existing Law" is divided into two sections: (1) books, articles, reviews, etc., with 302 titles, and (2) annotations on cases, answers to legal questions, etc., with 1501 titles. The works in both lists in this chapter are conveniently classified under the respective branches of law or other legal topics to which they relate. The *Bibliographie* also contains Professor Cleveringa's account of Professor Meijers' career, a list of similar necrologies by other writers, and three useful tables showing (1) the cases decided by the *Hoge Raad* to which Meijers' annotations relate, (2) duplications in the works listed (32), and (3) an alphabetical index in Dutch of the chief subjects treated in the works on existing law in the second chapter. In addition, three papers are included, supplementing those published in the *Verzamelde Privaatrechtelijke Opstellen*, relating to the degrees of inheritance in the European laws, so-called transfer of title as security in Dutch law, and the doctrine of frustration, as it is termed in English.

The collected papers herewith published by the Leiden University Press are divided into two corresponding series on legal history and modern private law, respectively. One volume in the first series, *Études d'histoire du droit*, has appeared; two others are to follow. The present volume includes essays on the "General Problems" of Western European legal history and on the history of French and Spanish law. Here are to be found Meijers' well-known reconstructions on the basis of medieval legal texts of Ligurian and Menapian racial groups and the related paper on the Decree of Andernach of 594 A.D., as well as an instructive analysis of the ancient calculation of the widow's share. The articles on French and Spanish legal history, aside from two articles on the sources, include papers on the "indivisibility" of confession in pleading; the special procedure for partition of land, " *cerquemanage*," found in the Walloon country in Belgium and contiguous French territory; the development of summary procedure in 18th century France—the *ordonnances sur référé*; the extremely interesting essay on the distinction between real and personal rights and actions in the laws of Northern France and England as derived from the ancient division of property into the family inheritance, the *hereditagia*, and

personal chattels, *catalla*; and the history of holographic wills in Roman, French, and Dutch law.

The second series of collected papers in three volumes, *Verzamelde Privaatrechtelijke Opstellen*, represents Meijers' monumental contributions to the modern civil law of the Netherlands. In the first volume are reproduced, among the more general contributions, the addresses on "Free Law," the relation between judge and legislature in the formation of law, the significance of the civil law in modern life, abuse of rights and *la fraude à la loi*, and the development of the "national idea" in the law. A second section contains the important articles on the revision of the Civil Code, while the two succeeding sections deal with matrimonial property and inheritance. The second volume relates to the law of property, evidence and procedure, and international private law, while the third is devoted to the law of obligations. As the above indicates, the *Opstellen* are almost exclusively devoted to private law; the field of labor law to which Meijers devoted special attention in his early years is not represented. It is not possible in this notice to consider or even to enumerate the 70-odd papers reprinted in these volumes. Apart from the more general articles which have been cited, special reference, however, may be made to Meijers' important studies included in the second volume relating to various aspects of private international law—recognition of foreign judgments, the law applicable in case of succession, *renvoi*, and the article already noted on the Benelux convention. While the large part of the papers in these volumes are oriented towards Dutch private law, they provide a mine of comparative study, since the many problems considered are approached in the light of comparative legal history and their treatment evidencing Meijers' comprehensive knowledge of Roman law, the medieval laws of Western Europe, the civil-law doctrines, medieval and modern, and the modern French, German, and English laws, as well as of the Dutch legal system, is invariably of general interest. These are, as it were, studies of the universal problems of private law in local form.

To the foregoing, should be added the three articles in the *Bibliographie* to which reference has been made and the new edition of the Asser-Meijers *Erfrecht*, revised by Mr. P. W. van der Ploeg, the leading work on the subject, a model exposition of the intricate law in this field, illuminated by the historical and comparative background, with exhaustive citations of the Dutch literature and case law, as well as to the leading French and Belgian treatises. In this edition, the literature and decisions of the fifteen years since the prior edition have been taken into account, as well as the Draft Civil Code.

The remaining titles here noticed are the official texts and commentaries of the so-called "*Ontwerp-Meijers*," the Draft of a New Civil Code, and Mr. Bast's useful volume comparing its provisions with the existing law. This monumental undertaking was the culmination of Meijers' interest during many years in the reform of the obsolescent and increasingly ill-organized legislation of the Netherlands. The articles reproduced in the first volume of the *Opstellen* at pages 93 ff. reflect the development of his ideas towards the

conclusion that a new and revised codification was requisite to bring the laws to modern form, which would enhance the prestige of Dutch legal science throughout the world. In 1947, he was commissioned to prepare a Draft Civil Code; the careful technique that was followed in its elaboration has been described by Professor Dainow in this Journal (vol. 5 (1956) 595). In 1954, Meijers presented the text and commentary of the first four Books of the proposed Civil Code, as above indicated. Unfortunately, Meijers' death shortly thereafter prevented him from completing the five remaining Books; the *driemanschap*, or committee of three appointed to prosecute the preparation of the Draft, utilized an incomplete manuscript left by Meijers for the fifth Book on the law of things (*Zakenrecht*), which is listed above.

It is not the place of this review to survey this monumental enterprise, to which, as above suggested, Professor Dainow has drawn attention. Those who wish to examine the many questions of detail which were considered will find Mr. Bast's work a useful guide. This contains a general part, indicating the arrangement of the Draft, the principal changes that it would effect in the existing Dutch law, the disputed issues and the legislative *lacunae* which the Draft resolves or fills; a special part exhaustively comparing each article of the Draft with corresponding present legislation; and an elaborate subject index citing on each specific item the present code provision or enactment, the parallel article or paragraph in the Draft, the nature of the amendment proposed in existing law, if any, and the relevant page reference.

It seems to be uncertain how soon the Draft as projected by Meijers will be completed and, if so, whether it will be adopted in the form contemplated. Meanwhile, the work which he started has stimulated certain reforms and will inevitably influence future legislation in the Netherlands and elsewhere. As such, the Draft and in particular Meijers' concise magistral commentaries on the many questions involved in the adaptation of the civil law to modern needs deserve special attention from the viewpoint of comparative law.

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OLIVECRONA, K. *The Problem of the Monetary Unit.* New York: The Macmillan Company, 1957. Pp. 186.

This reviewer happens to disagree with many conclusions in this book, yet he recommends it warmly for its thought-provoking, often even provocative arguments, for the wealth of material which is packed into this small volume, and because of the importance of the subject which has been much neglected in legal literature.

It has long been suspected that the philosophical and conceptual analysis of what money is may open new vistas in the field of monetary law. Nussbaum,[1] e.g. recommends the study of Simmel's *Philosophie des Geldes*[2] as "a

[1] Nussbaum, A. Money in the Law, Brooklyn: The Foundation Press, Inc. (1950) 18.

[2] Simmel, G. Die Philosophie des Geldes, (München: Duncker & Humblot, 1922, fourth edition).

most spirited and brilliant analysis of money [which] would deserve the attention of Anglo-American students." It is a merit of the book under review that it analyzes basic concepts such as "monetary unit" from a general philosophical point of view. The author does not make his own philosophical position explicit, but it is clear from his discussion that he belongs to the modern empiricist school which goes back to medieval nominalism. His approach in analyzing the meaning of key terms parallels that of C. K. Ogden and I. A. Richards in their influential *The Meaning of Meaning* (1930), an approach which may be called neo-nominalist. An entirely different philosophical position, however, also is reflected in the book. This is the existentialist (or rather "ontological") philosophy of Martin Heidegger. The author's conclusions concerning the "nothingness" of the monetary unit, to be quoted below, have a strongly Heideggerian rather than empiricist flavor. Provocative as this combination of empiricism and Heideggerian metaphysics is, it seems doubtful that it can really advance our thinking in monetary law.

Olivecrona takes the various current definitions of money and of the monetary unit, one by one, and discards them all. He shows, and we agree, that the identification of the monetary unit with a quantity of a metal, or with the value of a metal, should have been discarded even under the gold standard. The identification of the unit with purchasing power is a circular definition, he argues, for "in every act of sale and purchase the unit is supposed to exist, and the promise to pay a number of units is the means used by the buyer to acquire property. The ultimate position attained by monetary theory is to say: a pound is a pound; it is a name without anything being indicated as named by it; it is merely a word" (p. 119).

In a chapter headed "*Nothingness of the Monetary Unit*" (*ibid.*) Olivecrona concludes:

> "This is, indeed, an unavoidable conclusion. Every possibility of finding anything denoted by the word dollars, pound, etc., as they are commonly used, seems to be excluded. When we speak of such units, we have before us the word itself—visually or auditively. Furthermore, we have the idea that the word denotes something, though we are unable to say what. This idea, however, makes it psychologically possible to count numbers of monetary unit. But ***in reality the something is nothing***. There is only the word itself in conjunction with the idea that it denotes something.
>
> "*This is the final secret of the monetary unit*—the secret of the mysterious quality that has made the nature of money an enigma for hundreds of years. The search for this quality has indeed been a search in a dark room for a black cat who is not there" (emphasis added).

The author continues from this negative plateau. Although the monetary unit is nothing, he says, a promise to pay money is not a mere game of words. It is true, he goes on, that monetary obligations can "never be fulfilled in the exact sense of the word for [the debtor] cannot deliver to the creditor that which is owed to him [because it is "nothing"] but only something else," namely what is legally a medium of payment (p. 122). This paradox is resolved by the operation of the law, the author argues, whereby the debtor, in making a

promise to pay a sum of money, "puts himself in a position of restraint" (p. 125), and the law provides for methods by which the debtor can rid himself of this position, namely deliver media of payment. This solution, the author warns, does not imply that the debtor's obligation was to deliver what he actually delivers when he pays as a result of the operation of the law!

Olivecrona comes to these novel conclusions on the basis of the fact that all the definitions he could find proved to be wrong or failed in some respect.

There is an obvious hiatus in this reasoning because (1) even if all definitions of money so far advanced were wrong, it does not follow that there *can be* no satisfactory definition, and (2) because the lack of an acceptable definition does not prove that money is "nothing."

But it also appears to this reviewer that the author discards too easily some of the classical definitions of money. Take this as an example:

> "The reasons for the functional definition are easy to understand. But the definition is circular. In order to know what are the specific functions of money, one must already know what money is. The concept of money is therefore presupposed in the definition of money.... To define money as that which functions as money seems to be like defining an umbrella as an object that fulfils the particular functions of an umbrella ..." (p. 11).

Naming the *genus proximum* and the *differentia specifica* is not the only possible way to define a concept, and definitions which describe the functions of an object to be defined are well accepted in logic. If instead of saying "money is what functions as money," which is a motto and does *not*, of course, describe the functions of money, you say "money is an object, or a claim to an object, which in a society is generally used for the exchange of goods and services, etc., etc.," you really begin to describe the functions of money, and you will not be accused of defining *idem per idem*.

If, as we must, we admit the validity of "contextual" definitions, it will appear that the difficulties under which the author labors are largely self-inflicted, and that the heroic solution he proposes, treating the monetary unit as "nothing," is really a gratuitous one.

A book review in a law journal is hardly the proper forum to attempt to resolve the philosophical dispute which has been raging since the eleventh century between nominalists and realists. What should be pointed out is this: You are entitled to accept, if you wish, the general statement as correct that "all universal terms such as indicate genus and species and all general collective words or terms such as *animal*, *man*, *tree*, *air*, *rock*, *ship*, *city*, *nation*, *wagon*, etc., have no objective, real existence corresponding to them, but are merely words, names, or terms, mere vocal utterances, and that only particular individual things and events exist."[3] If you accept this, the word "money" and "monetary unit" have no reality either. This does not add anything, however, to our understanding of money because—if you accept nominalism, or one of

[3] From the definition of "Nominalism" in Webster's New International Dictionary Springfield, Mass.: G. C. Merriam Co., Publishers. (1953, second edition) 1659.

the neo-nominalistic approaches—you will say the same thing about clouds, rocks, and ships, and everything else listed in Webster. On this position, the "nothingness" attributed by the author to the monetary unit attaches also to every other term. What we learn from such analyses, then, is merely that "dollar" and similar words are general terms. This, I submit, adds very little to our understanding of what money is.

We are even less able to accept the second half of the author's argument, where he explains that although money is "nothing," monetary obligations are not "nothing," because the law provides for a substitute (legal tender, which apparently is not nothing) which the debtor can deliver to free himself from the "situation of restraint." If the debtor promises the creditor to pay a sum of dollars on a certain date, and through the mysterious operation of the alchemy of law this means that the debtor is to deliver to the creditor legal tender which adds up to the promised amount, then the debtor's obligation is *ab initio* to deliver such legal tender. The author attaches much importance to the fact that under certain conditions (and not as a general rule, as is asserted) the debtor can discharge his obligation by check instead of legal tender; this indeed requires a refinement of the statement, as do changes in the monetary unit, *Aufwertung*, and some other changes in monetary law, but does not affect the basis of the principle.

The book contains a number of analytical excursions on subjects closely related to the main theme, which are written with profound understanding of the structure of monetary obligations and the practical working of a modern money-economy. The book has a selected bibliography.

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ENNECCERUS, L.—KIPP, TH.—WOLFF, M. *Lehrbuch des Bürgerlichen Rechts.* Vol. II. *Recht der Schuldverhältnisse*, 14th ed., 1954, Heinrich Lehmann; Vol. III. *Sachenrecht*, 10th ed., 1957, Martin Wolff und Ludwig Raiser; Vol. V. *Erbrecht*, 10th ed., 1955, Helmut Coing. Tübingen: J. C. B. Mohr (Paul Siebeck), 1954, 1955, 1957. Pp. xx, 1052; xx, 825; xv, 568.

The above three volumes are the latest editions in the series *Lehrbuch des bürgerlichen Rechts* which, since its inauguration by Ludwig Enneccerus in the year of the enactment of the German Civil Code, in 1900, has become the classic textbook on the private law of Germany. The previous editions of two of the volumes under review were exhausted in practically no time; the volume on Obligations (*Recht der Schuldverhältnisse*) in 1950; on Succession (*Erbrecht*) in 1955; twenty-five years, however, had to elapse between the last two appearances of the volume on Property (*Sachenrecht*). The work on the new edition was begun—*habent sua fata libelli*—in All Souls College, Oxford, in 1947, by the only surviving founder of the *Lehrbuch* series, Martin Wolff, also the

author of the previous editions on *Sachenrecht*. Professor Wolff enlisted the help for the new edition of Professor Ludwig Raiser of Tübingen, and he was able to check the galleys of the volume before his death. The work was finally seen off to press by Professor Raiser.

It is of extreme interest to note the transformation of the governing positive laws in accordance with the changes in social conditions. As the three forewords to the above volumes point out, the legislator was forced to depart from the spirit of unlimited individual freedom in which the Code was originally conceived, and to admit the newly emerging principle of the gradually increasing dominance of the social function over individual values. This change, slow at first in the period between the enactment of the Code and the outbreak of World War I, was dramatically accelerated in the next twenty years in which the Weimar Constitution, National Socialism, and the tragedy of World War II followed in brief intervals. The change was first officially recognized in the field of property. Article 153 of the Weimar Constitution expressed the equality of individual and social principles in declaring that the concept as well as the use of property be oriented towards the aim of public welfare (*Sachenrecht*, p. 5), and this same idea was taken over by Article 14 of the *Bonner Grundgesetz*. Naturally, the other parts of the Code equally reflect the ground gained by the social as against the individual importance of legal institutions; however, as both Professors Coing and Lehmann point out (*Erbrecht*, §1; *Recht der Schuldverhältnisse*, Foreword) the individual's freedom of testation as well as his autonomy within the more flexible rules of contracts law warrant greater respect on the part of the legislator even from the standpoint of social welfare than given by the more rigid confines of the rules on property. In consequence, the endeavors of present German legislation in these two fields point towards the unchanged recognition of individual freedom by the state with a view, however, to co-ordinate it with social considerations as well as with legal security.

It goes beyond a mere review to exhaust the details of these treatises, each of them classic in substance and exposition. Suffice it to give the general outlines:

Sachenrecht. Five main chapters, under the headings, Possession (fact and effects of); Real Estate (containing an historical analysis of the system of land registration, *Grundbuch*); Ownership (Concept, Acquisition, Loss, and Transfer, with a special treatment of the social Law of Settlement; Mining law and Water law); Burdens on Ownership (Servitudes, Usufruct, Mortgages); and Rights in Ships and Shipyards.

Recht der Schuldverhältnisse. Divided into Part I (General provisions, Creation, Change, and Discharge of Obligations; Transfer and Acceptance of Debt; Transitory Provisions) and Part II (Special obligations; Sale; Barter; Gift; Rents and Leases; Contracts for services (*Dienstvertrag*) and Contracts for production (*Werkvertrag*); Corporations; Unjust Enrichment; and Liability for Unlawful Acts).

Erbrecht. The German law of Succession is treated in four parts with subchapters on the Capacity to Inherit; Statutory and Testamentary Succession; Legitim; The Legal Status of the Heir; Limited and Reversionary Heirs; Supervisory Functions of the Courts; Wills; Legacies; Transactions Mortis Causa; Devolution of Succession; Disposal of Succession; The Testamentary Executor; and Provisions on Taxation.

In addition to being exhaustive treatments of German law, these works are of great value to international lawyers and comparatists. The *Sachenrecht* treatise carries at the end of each chapter the pertinent conflict provisions, while the treatises on Succession and Obligations provide extensive references and discussions on the historical development of the German and the corresponding foreign institutions with reference to Swiss, Austrian, French, and Italian laws as well as the common law systems. The statute law, case law, and bibliographical references are brought up to the latest date.

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VALLINDAS, P. G. *Law of Nationality According to the Greek Nationality Code of 1955.* (In Greek). Thessaloniki: Sakkoulas, 1957. Pp. 178.

The Greek Nationality Code of 1955, containing the conditions of acquisition and loss of Greek citizenship, is the product of long and extensive comparative study, which started in 1940. Professor Vallindas, Director of the Hellenic Institute of International and Foreign Law and an outstanding authority in this field, analyzes and interprets it with his usual clarity and succinctness. Although the nature of the book as a student manual prevents him from citing bibliographical material in detail, he manages, in many instances, to compare the principles in the Code with the corresponding provisions of American, English, French, German, Italian, and Soviet nationality laws and comes up with interesting conclusions. Further, he gives us comprehensive summaries of the earlier Greek nationality legislation, especially under Arts. 14–28 of the Civil Law of 1856, and discusses the innovations in the Code.

Since many Americans of Greek extraction are still considered Greek citizens under Greek law, and in view of the far reaching international jurisdiction of the Greek courts, a brief outline of the principal features of the Code may be worthwhile.

The Code did not alter the basic structure of Greek nationality legislation; it mostly simplified, systematized, and brought it together. *Jus sanguinis*, consecrated in the Troizinos Constitution of 1827 and dominating all the subsequent Acts, is retained as the most important way of acquiring Greek citizenship. It is supplemented, as in most countries, by an extended if auxiliary application of the *jus soli*. A country of emigration, Greece is interested in protecting its emigrants and keeping in contact with them. Therefore, its citizenship is conferred *ad infinitum* on children of Greek fathers and, under certain circumstances, of Greek mothers, regardless of country of birth or

residence. No registration, as in Great Britain, or any other action whatsoever is required. In view of the limited application of automatic loss of citizenship, many Greek emigrants and their descendants have been unpleasantly surprised to learn, when visiting Greece, that they were considered draft-dodgers. Fortunately, common sense and certain provisions under the NATO Agreements cushion them from punitive consequences.

Marriage to or recognition and legitimization by a Greek citizen also confers Greek citizenship. In an attempt to strike a balance between the antagonistic principles of family unity, equality of husband and wife, and consensual citizenship, the Code followed an intelligent pattern. It set down general rules, which guarantee a reasonable degree of family unity, but allowed, in many cases, the person involved to file a declaration to the effect that Greek citizenship is not acquired or lost. Thus, an alien woman marrying a Greek acquires Greek citizenship unless she files a declaration to the contrary. On the other hand, a Greek woman marrying an alien loses her citizenship, but she may file a declaration retaining it.

After having expanded the guarantees against involuntary acquisition of citizenship, the Code closed the last door (i.e. departure by a non-ethnic Greek citizen without intent of returning) of unconditional voluntary expatriation. Government permission is now always required for divestment of Greek citizenship, even in such cases as voluntary naturalization or assumption of public office in another country. No such thing as forfeiture of citizenship by residence abroad is recognized. The only instances of automatic loss remain, of course, certain parental or marital relationships with aliens.

Dual or multiple nationality and statelessness are two of the most important evils caused by differences in nationality laws, which the Hague Convention of 1930 purported to combat. It has been recently accepted, however, that dual nationality is a much lesser evil than statelessness. In accordance with this trend, the Greek legislator is not seriously preoccupied with dual nationality. A Greek may retain his citizenship, even if he acquires a foreign one (automatically or voluntarily after permission). By the same token, an alien may acquire Greek citizenship without losing the one he already possesses. Thus, the dual-citizen-to-be is not forced to a choice, as in Poland and the United States. On the other hand, scrupulous care is exercised for the prevention and cure of statelessness. Unlike Germany, where a citizen may choose statelessness but is constitutionally protected against being forced into it, Greece does not allow voluntary expatriation, if it would result in statelessness, although, under certain circumstances, it may denaturalize its citizens leaving them stateless. Furthermore, the Code has given a wider scope to the provisions that enable a member of the Greek ethnic group to acquire or resume Greek citizenship when stateless.

The most remarkable peculiarity in Greek nationality legislation appears in the special privileges accorded to members of the Greek ethnic group. These privileges are in the nature of easier acquisition and retention of the Greek

citizenship rather than in according special status to a class among Greek citizens. It should be made clear that there is no distinction between a national and a citizen in Greece. Unlike ancient Greek and Roman practice and such modern distinctions as between *Reichsbürger* and *Staatsangehöriger*, *citoyen français* and *sujet*, 'German citizen' and 'German national within the meaning of the Federal Constitution,' 'British of English personal status' and 'British national,' or 'United States Citizen' and 'United States national' (Filipino), all Greek citizens or nationals enjoy full rights. Even the distinction between natural-born and naturalized citizens, significant in France and the United States, is only academic.

The privileges accorded to the ethnic Greeks, are chiefly easier naturalization (waiver of residence requirement, etc.) and even easier resumption of Greek citizenship. An ethnic Greek is anyone who has an ethnic Greek conscience, i.e. shares the tradition and ideals of Greek historical destiny, regardless of his race, stock, color, etc., and, conceivably, of language and religion. Other aliens may be naturalized under the same conditions of selection, through a relatively simple procedure and need not speak Greek. The most important qualification is their moral character.

It is unfortunate that no judicial review of the decision on the naturalization application by the Minister of the Interior is provided for. The Minister acts in his complete discretion as in France and unlike the Swiss practice. Denaturalization, essentially a punitive but in theory an administrative measure against those who acquire foreign citizenship in violation of the Greek law or behave in a manner detrimental to the interest of Greece, is also entrusted to the Minister.

As is evident, the Code deals only with matters of acquisition and loss of citizenship. Other provisions on nationality, status of aliens, etc. are found in the Civil Code, in special regulations and in many treaties.

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The British Commonwealth: The Development of its Laws and Constitutions. Under the general editorship of George W. Keeton, M.A., LL.D. London: Stevens and Sons Ltd. Toronto: Carswell & Co. Ltd.

Volume 1: *The United Kingdom*: Part 1. England and Wales, Northern Ireland and the Isle of Man, by G. W. Keeton and Dennis Lloyd, M.A., LL.B., with specialist contributors. 1955. Pp. xiv, 523 pp., incl. Table of Statutes (9 pp.), Table of Cases, (12 pp.) and Index (7 pp.).

Part 2: Scotland and the Channel Islands, by T. B. Smith, M.A. and L. A. Sheridan, LL.B., Ph.D. 1955. Pp. xi, 603–1216, incl. Appendices (18 pp.), Table of Cases (15 pp.), Table of Statutes (Scotland) (6 pp.), Index (Scotland) (20 pp.) , and Index (Channel Isles) (2 pp.).

Volume 2: *The Commonwealth of Australia*, under the general editorship of G. W. Paton, M.A., B.C.L., with specialist contributors. 1952. Pp. xvi,

355, incl. Bibliography (7 pp.), Table of Statutes (10 pp.), Table of Cases (5 pp.), and Index (5 pp.).

Volume 4: *New Zealand*, under the general editorship of J. L. Robson, LL.M., Ph.D., with specialist contributors. 1954. Pp. xix, 384, incl. Bibliography (4 pp.), Table of Statutes (11 pp.), Table of Cases (2 pp.) and Index (8 pp.).

Volume 6: *The Republic of India*, by Alan Gledhill, M.A., I.C.S. (Retd.). 1951. Pp. xii, 309 pp., incl. Bibliography (1 p.), Table of Statutes (4 pp.), Table of Cases (1 p.), and Index (11 pp.).

Volume 8: *Pakistan*, by Alan Gledhill. 1957. Pp. x, 263, incl. Bibliography (1 p.), Table of Statutes (4 pp.), Table of Cases (3 pp.), and Index (7 pp.).

[Volume 3 (Canada), Volume 5 (Union of South Africa) and Volume 9 (West Africa) are in preparation. Volume 7 (Ceylon) is published, but has not yet come to hand.]

This outstanding series should, if nothing else, remove any lingering doubts which still seem to exist in some American minds of the relationship between the Commonwealth countries and the United Kingdom. These volumes illustrate the fact that the members of the Commonwealth dealt with are independent nations working out their own political and legal lives along their own lines. In describing the legal and constitutional developments in each country, each volume contains its own illustration of the extent to which the notions of law and justice developed in Great Britain have been absorbed, modified, extended, and rejected in countries into which it has been imported.

It is hardly necessary to say that all these volumes will be of considerable interest to the comparative lawyer, and also to the "non-comparative" American reader, who is sometimes mystified to find that some countries survive quite satisfactorily without the benefit of a written constitution. Some volumes will attract interest for different reasons: Volume 2 (Australia) is possibly likely to attract more attention than others, as Australia was the first country in the British Commonwealth to adopt a federal system of government and the first to adopt a written constitution which is founded largely on the Constitution of the United States. India also now has a federal system of government and a written constitution, and these are fully dealt with in Volume 6. Part 1 of Volume 1, dealing with the development of the laws and constitution of England will, of course, be of considerable value. The New Zealand Volume (Volume 4) in particular will attract those who are anxious to obtain an idea of the workings of a social welfare state: New Zealand was the first country in the Commonwealth to introduce comprehensive legislation in this field, and in addition has always been in the forefront of reform of the common law: indeed, many of the reforms now adopted in other parts of the Commonwealth and in England were originated in New Zealand.

In the space available it is impossible to embark on any detailed criticism of these volumes. It is sufficient to say that they are all of high standard: there

are, of course, due to the multiplicity of authors and editors, variations within that standard, but on the whole each volume gives a highly reliable and authoritative account of the legal and constitutonal development of the countries concerned. There is naturally no attempt in any of the volumes to provide an exhaustive treatment of the various legal topics which are dealt with: for example, in volume 1, the English law of negligence is summarized in 3½ pages; but in each case such summaries are very well (and in some cases, miraculously well) carried out, and provide introductions to the respective topics which are quite adequate having regard to the purpose of the volumes.

The volumes dealing with Scotland, India and Pakistan (Volumes 1 (Part 2), 6, and 8 respectively) are perhaps more likely to appeal to the specialist: the intricacies of Scottish law are made to appear much simpler through Mr. T. B. Smith's lucidity. Professor Gledhill is, of course, one of England's leading specialists on Indian and Oriental law: his volume on India proved so popular that it had to be reprinted shortly after its original publication. His volume on Pakistan is the first to contain a comprehensive jurisprudential account of the new Pakistan Constitution (which came into force on March 23, 1956). Both of his volumes are extremely valuable as easily accessible and reliable commentaries on the laws of these two countries.

There is an admirable account of the Australian Constitutional structure by Professor Geoffrey Sawer in the volume on Australia (Volume 2, Chapter 2), and Professor Paton's chapter on the reception of the common law in Australia deserves close study (Chapter 1). As far as private law is concerned, the editors have had to handle the laws of six jurisdictions: this they have done with remarkably little resulting confusion, and the more significant features of the differences between the jurisdictions are well brought out.

It was said earlier that New Zealand was the first Commonwealth country to adopt comprehensive legislation with a view to turning itself into a welfare state, and in this respect it has possibly gone further than any other Commonwealth country, probably to the detriment of its economy. In this respect the chapters on Social Legislation (Chapter 5), Industrial Relations (Chapter 6), Marketing (Chapter 8) and Exchange Control (Chapter 9), will be of considerable interest to American readers, although Dr. J. L. Robson, who compiled these chapters, has hardly what could be called a stimulating style of writing. New Zealand was also the first country in the Commonwealth to adopt a comprehensive Criminal Code, entirely exclusive of the common law, and at present has possibly the most advanced system of family law in the Commonwealth. Professor I. D. Campbell, the leading New Zealand specialist in these fields, has contributed excellent chapters on these topics (Chapters 10 and 12), which are all the more stimulating because he does not (characteristically) hesitate to be extremely critical where the occasion warrants criticism: both of these chapters are well worthy of the American reader's careful attention. Incidentally, at the risk of seeming to give far too much prominence to the New Zealand volume, it is a little difficult to see why it was thought necessary to include in the

otherwise admirable bibliography, under the heading of Administrative Law, either A. E. Currie's *Crown and Subject*, which is hardly the best work available, or D. J. Hewitt's *The Control of Delegated Legislation*, which is regarded even in New Zealand as scarcely authoritative. This, however, leads us to the point that although the bibliographies included in most of the volumes are admirable, rather too often a book is included simply because it is the only one in its field, regardless of its quality. However, the quality of the volumes themselves more than makes up for this.

In his review of Volume 1 (in (1956) 72 L.Q.R. 578) Professor Wolfgang Friedmann (who was on the editorial board concerned with the Australian volume, and contributed a chapter on Australian administrative law) declared that this series represented "a venture that has already enriched the collaboration and understanding between the various members of the legal family of the British Commonwealth, for their mutual benefit." It is not unlikely that the series will also play a substantial part in contributing to mutual understanding between the Commonwealth as a whole and other countries. The Scottish, Indian, and Pakistan volumes are the first modern authoritative efforts towards a complete statement of the laws of those countries. All the volumes in the series, apart from being extremely valuable as reference works, are invaluable as a contribution to the literature on comparative law, and as demonstrating the curiously piecemeal development of a community of nations and the ties which bind them together to form a cohesive factor and a stabilizing body in an uneasy world.

It is perhaps an anticlimax to end by saying that all the volumes in the series are beautifully printed and bound.

B. D. INGLIS

CHITTY ON CONTRACTS. 21st edition. Volume I: *General Principles*, edited by Kenneth Scott, M.A., of the Middle Temple, Barrister-at-Law, and Bryan Clauson, M.A., of Lincoln's Inn, Barrister-at-Law. Pp. clxiv, 756, and index, 80 pp. Volume II: *Specific Contracts*, edited by Peter Allsop, M.A., of Lincoln's Inn, Barrister-at-Law, Barry Chedlow, of the Middle Temple, Barrister-at-Law, Bryan Clauson, M.A., of Lincoln's Inn, Barrister-at-Law, Raoul P. Colinvaux, of Gray's Inn, Barrister-at-Law, C. Grunfeld, M. A., LL. B., of the Inner Temple, Barrister-at-Law, R. A. MacCrindle, LL.B., of Gray's Inn, Barrister-at-Law, Clive M. Schmitthoff, LL.M., LL.D., of Gray's Inn, Barrister-at-Law, and D. A. L. Smout, M.A., LL.B., LL.M., of Gray's Inn and of Osgoode Hall, Barrister-at-Law. Pp. cxxxi, 681, and index, 58 pp. London: Sweet & Maxwell Limited, 1955.

CHARLESWORTH ON NEGLIGENCE. 3rd edition, by J. Charlesworth, LL.D., of Lincoln's Inn, a Judge of County Courts. Pp. lxxv, 638, and index, 34 pp. London: Sweet & Maxwell, Ltd., 1956.

The galaxy of talent employed in editing this new edition of *Chitty* has carried out the major task of reforming it into a modern law book with consid-

erable success, although the amount of credit due to the efforts of the general editors, Messrs. Burke and Allsop, is not made obvious by the fact that their names do not appear on the title-page.

Part of the reform was the division of the book into two volumes. Volume I deals with the general principles of contract, and contains the first sixteen chapters of the previous edition, and Volume II, in which most of the textual change and rearrangement is to be found, deals with specific contracts, and in addition to including Chapters 17 to 28 of the previous edition, adds three entirely new chapters on Carriage by Land and Air, Conflict of Laws, and Insurance (other than Marine). The chapter on the relationship between banker and customer has been completely revised, and the chapters on Bailment, Hire-Purchase (i.e., conditional sales), Lotteries, Gaming and Wagering, and Sale of Goods, have been expanded. The editors considered that the chapters in the previous edition on Agency, Master and Servant, and Partnership, were inadequate, and have expanded them considerably to deal with aspects of the subject matter which had previously not been touched on: the only really substantial complaint this reviewer will make is that these chapters are still inadequate, although, if there can be degrees of inadequacy, rather less so than formerly. A new section on Medical Partnerships has been added to the Chapter on Partnerships. Each volume contains its own table of cases and index, but included in the index to each volume is an outline index to the material in the other volume. The binding, the printing, and the paper also do the publishers great credit.

This edition of *Chitty*, as were the other editions, is intended primarily as a work of reference for practitioners in English law, and its value in this respect enhances its value to the non-English lawyer. The common law, as it appears from the cases, is stated concisely, plainly, and (with the reservations mentioned below) fully. Academic prolixity is avoided, and in general these volumes are books where one can without much trouble obtain rapid and reliable information. The admirably lucid way in which the decisions in *Foakes* v. *Beer* (1894) 9 App. Cas. 605 and the *High Trees House* case [1947] K.B. 130 are dealt with, in each case in a line or two, is an example of a style many may wish more writers would follow. If more lengthy (and, it should be said, usually less illuminating) treatment of controversial topics is required, it can be found elsewhere, and in this respect the editors are to be praised for providing in some cases references to treatises and articles, a feature which was not to be found to any pronounced extent in previous editions.

What will be of particular interest in this country is the fact that some reciprocity in citations has appeared. A matter which has worried some American writers is that they are usually obliged to cite English cases and authorities in works on contracts, yet English writers never seem to have felt the slightest obligation to cite American authorities. Admittedly, American authorities are at the moment only of academic interest in England, if in fact anyone in England can obtain access to them; the currency exchange position renders the

acquisition of American materials almost impossible. But there is no reason why the legal concepts developed on this side of the Atlantic should not throw some light into the darker recesses of the English law of contract, and it is refreshing to see that the editors have made, *inter alia*, frequent references to the Restatement and Williston.

In general, therefore, this new edition of *Chitty* is a very valuable acquisition: although the law is stated as at August 1, 1954, the volumes are periodically brought up to date by the issue of cumulative supplements, which are extremely simple to use, and which fit comfortably into a specially-designed pocket in the back cover of each volume.

It is unfortunate to have to conclude this recital of praises with a few complaints, but in a work which is supposedly a complete statement of the law, the topics of Agency, Master and Servant, and Partnership cannot really be adequately dealt with in (respectively) 61, 64, and 31 pages, and these chapters do not in fact contain exhaustive treatments of the various subjects. One may also perhaps wonder about the wisdom of including the chapter on Conflict of Laws (Vol. II, Chapter 5) in the form in which it is here presented:[1] Dr. Schmitthoff makes the whole problem appear much easier than it is, and the structure of the chapter is not always easy to follow. Surely, in a reference book, it is somewhat misleading to devote a little under 10 pages to a somewhat academic discussion of the "proper law" doctrine, leaving the impression that the law chosen or inferred to be chosen by the parties governs almost every possible aspect of a contract,[2] and then to devote the remaining 37 pages of the chapter to an enumeration of the exceptions to the doctrine, and the proper law applicable in specific instances, which leaves the impression that the doctrine is decidedly not universally applicable. The statement on page 274: "The intention of the parties governs all aspects of the contract; it may provide for the application of different legal systems to different parts of the contract; but it is subject to certain limitations designed, mainly, to prevent a misuse of the discretion conferred on the parties by the law" simply does not make sense: it is

[1] We are informed (p. 266, n.) that this chapter is founded on Chapter 5 of Dr. Schmitthoff's The English Conflict of Laws, 3rd ed., (1954).

[2] Particularly at pp. 271–2:

"It is now necessary to consider whether all the incidents of a contract are governed by the doctrine of the proper law. . . . In particular, the problem is whether the capacity to conclude a contract and its essential validity are all [sic] governed by the proper law of the contract.

"This is a matter which is not free from doubt. . . . It will be observed later that the doctrine of the proper law is subject to certain limitations, *viz.*, the choice of the parties must be bona fide and there must be no reason for avoiding it on the ground of illegality. [The reference is, of course, to the *Vita Food* case.] In the result it is believed that in English law all incidents of a contract, including capacity, form, essential validity or discharge (but excluding, perhaps, the legality of the contract), are governed by . . . the doctrine of the proper law."

It may perhaps be mentioned that Dr. Schmitthoff's comment that "This is a matter which is not free from doubt" is a prime example of the classic understatement.

hardly accurate to imply that all the limitations the learned writer mentions later (such as capacity to contract) are designed mainly to prevent a misuse of what the writer appears to regard as the parties' absolute discretion in the matter. Capacity is merely one example of an "incident" of a contract in which the parties' intentions are entirely irrelevant; the topic of the "proper law" is difficult to deal with, but it is by no means the alpha and omega of the private international law of contracts. The real basis of this complaint is that one cannot, as one can with the remainder of these volumes, find one particular point contained in one or perhaps two paragraphs, with any certainty that one has found the right answer to the problem the chapter was consulted to solve: the whole chapter has to be read, and even then the reader may well find that he is groping in a maze of proper law and exceptions which seem to negate the larger part of the doctrine.

When the whole treatise is considered, however, these are really very minor blemishes: it is nevertheless irritating to have to turn to Lindley to obtain a full statement of the law of partnership, or to Dicey to obtain a reasonably reliable statement of conflict of laws in its relation to contract. But generally the work is of considerable value.

The first edition of *Charlesworth on Negligence* appeared in 1938 as a substitute for *Beven*, which, it will be remembered, was notable for what Stephen Chapman describes in (1957) 73 L.Q.R. at 405 as its "endearing idiosyncrasies and its devastating castigations of those regarded as straying from the true and narrow path." Judge Charlesworth's treatment of his subject may prove equally stimulating, if only for his somewhat original views of the nature of the duty to take care (apparently no English writer has realized that the description of the concept of negligence in the American Restatement is even more original), and dangerous chattels as a separate branch of the subject, and for his interesting discussion of *London Graving Dock Co., Ltd.* v. *Horton* [1951] A.C. 737. Those who have followed the academic controversy over the Court of Appeal's decision (and more particularly Denning L.J.'s judgment) in *Candler* v. *Crane Christmas & Co.* [1951] 2 K.B. 164, will be intrigued with Judge Charlesworth's comment that "There is considerable literature about this case, based on the view that the law ought to be different": this admirable sentence sums up everything that can be said in favor of the decision of the majority of the court in a nutshell.

Large portions of this edition have been rewritten to meet the requirements of the continuous development of the law: the chapter on Master and Servant has received particular attention in this respect, and no doubt whatever fresh developments there may be in this field as a result of the recommendations of the Law Reform Committee, which has considered occupiers' liability to invitees, licensees, and trespassers (Cmd. 9305), will be embodied in the cumulative supplements to be issued from time to time.

Altogether this is a very thorough treatment of the topic, and Judge Charlesworth from time to time supplies just the right amount of indication of his own views to stimulate the reader into wondering whether he can venture to dis-

agree with the author. The result is an interesting and very useful book. As is the case with Chitty, the publishers are to be complimented on their production.

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VON HENTIG, H. *Zur Psychologie der Einzeldelikte.* Vol. I. *Diebstahl-Einbruch-Raub.* Vol. II. *Der Mord.* Tübingen: J. C. B. Mohr (Paul Siebeck), 1954; 1956. Pp. vii, 195; viii, 287.

Professor Hentig's study contains four monographs, three short ones in the first volume and a lengthy study of murder in the second. There is no underlying reason why these four crimes were selected for treatment except the personal preference of the author, and probably the availability of the factual material. The author considers his work as a pioneering effort within the framework of the general science of criminology, where the study of individual offenses has until now been rather neglected. In the author's opinion his studies are first steps in this direction, and in connection with his monograph on murder (Vol. II) he asserts that it is little more than a cornerstone for a future comprehensive study of that crime.

To delineate the character and scope of Professor Hentig's monographs, it must be stated at once that the legal aspect of his study and the juristic analysis of issues involved play only a minor role. Law and its definitions are referred to infrequently and sometimes somewhat vaguely. It has only a supporting role in a drama which evolves on a different plane altogether. The terminology used in the book under review has a connection with legal terminology only in so far as the material and statistics used in the book refer to facts falling within certain legal categories garnered from the practice of the courts and the experiences of the agencies concerned with the administration of justice. In fact, our author operates with concepts which have no root in any determined legislation and have a juristic meaning in only the most general sense. If it were not for the fact that most of our information on crime and its social and psychological concatenations come from sources connected with law enforcement, it would be conceivable that Professor Hentig's book could be written with no reference to crime as a legal phenomenon. In fact all references to law could be eliminated without affecting its general tone and value.

The fundamental fact which the author brings to the attention of the reader is the inadequacy of the information about the phenomenon of crime. Only a minute proportion of criminal acts, including the most serious transgressions of law, reach the courts and are subject to analysis by experts. According to the author, crime has its roots in social processes, and what we see is only a small part of the total number of criminal activities which emerges from the darkness of the unidentifiable and of the unknown.

The author discusses crime as a reaction to the conditions of society, and as a problem of individual existence. He points out the connection between

various forms of individual activities and specific conditions of society (primarily economic conditions), the relation of crime to social crises, age, sex, mental diseases, alcoholism, etc. From that most general consideration of the subject the author examines criminals as a component of society and studies criminal ethics, the *modus operandi* and mechanics of crime, the technical problems connected with criminal activities of specific types, and the resulting attitudes of the criminal to the victim and to society. As the last stage, the author examines the psychology of individual criminals and the motivation and circumstances which launched individuals on criminal careers.

Although only marginally connected with legal problems the book is of extreme interest to practical lawyers and for the study of criminal law. Judges, prosecuting attorneys, and defense lawyers will find in the book much to explain various aspects of the criminal cases coming before the courts. It carries an important message for practical sociologists and psychologists. A practical lawyer who has had an opportunity to become acquainted with the phenomenon and the world of crime will find much in Professor Hentig's book to bear out his own personal experiences and impressions.

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FRIEDRICH, C. J. *Die Philosophie des Rechts in historischer Perspektive*. Berlin-Göttingen-Heidelberg: Springer-Verlag, 1955. Pp. 153.

FECHNER, E. *Rechtsphilosophie. Soziologie und Metaphysik des Rechts*. Tübingen: J. C. B. Mohr (Paul Siebeck), 1956. Pp. vii, 303.

WIEBRINGHAUS, H. *Das Gesetz der funktionellen Verdoppelung. Beitrag zu einer universalistischen Theorie des Internationalprivatrechts*. Saarbrücken: West-Ost-Verlag, 1955. Pp. 157.

What the authors of these three fascinating books have in common is a tentative approach to some basic problems of legal thought as they present themselves in a new light within the experience of our age. Friedrich sets out to put the problems of present-day jurisprudence within the context of the history of legal philosophy. Fechner calls his book an "*Entwurf*," and explains this word as an attempt to spell out the "experience of a generation which has returned after lost years with shot limbs and broken ideals, has learnt in the war to look death in the eyes, and now knows that the worst does not happen always" (7). And Wiebringhaus tries to interpret the intriguing theoretical problems of private international law in the light of the fascinating hypothesis of functional reduplication. In doing so, he is inspired by Zitelmann's words: "to define what is not yet defined, to pour into stable forms what is still fluid, and hereby to try to develop further the general sense of law and even to influence the practice of law."

To begin with this last attempt, Wiebringhaus offers a fascinating application of Scelle's theory of "*dédoublement fonctionnel*" to private international law. The general term 'international law' comprises both public and private

international law, the first being called the 'law of nations' (*Völkerrecht*). The double function theory is understood as a synthesis of particularist and universalist views of international law. In private international law, national institutions carry out international functions. According to the double function doctrine, therefore, even an *ex post* appraisal of present-day private international law must recognize that a national judge, when he has to decide in a case of private international law, is at the same time an international judge as well (120). Furthermore, differences in degree are discovered between the phenomena of double function: conflict norms established by a single state represent a lower degree, while those established by international convention amount to a higher degree of double function. As a consequence, conflict norms derived from treaties should prevail over national conflict norms, even before national courts. It follows from the thesis also that questions of foreign law are not questions of fact, but questions of law. The national judge has to apply foreign law *ex officio*. Qualification according to the *lex fori* is to be *"largo sensu"*: with as much 'largeness' as the facts in question require (125), while in case of conflict norms derived from treaties, qualification according to the *lex fori* is out of the question. The different conceptions of "public policy" as derived from national laws ought to be treated as substitutes for a unitary conception of international 'public policy,' that is to say, interpreted as best serving international solidarity (127). The problem of *renvoi* cannot be solved *ex post*, that is to say, in the present stage of *'dédoublement fonctionnel,'* but only when the latter is replaced by a universal legal and institutional order. This is true of *renvoi* in the genuine sense of referring *back*, not of referring *further*, which is a step forward to the unification of private international law (128).

The whole *ex post* appraisal leads to the requirement that the national judge be aware of his role in international jurisdiction (129). The *ex ante* appraisal looks forward to conflict norms established by international legislation, courts, and federal execution. This federalism would not hinder, however, local jurisdiction of national courts, but merely review them (133). The author is fully aware of the difficulties in the way of establishing such world law. Yet he tries to visualize what would become of the hardest problems of private international law under such hypothetical world law. Chaos and uncertainty would be reduced. Qualification would follow conflict norms established by international legislation, utilizing terms approximately corresponding with those of national systems of law. The problem of 'public policy' would be solved by 'world private law,' while the problem of *renvoi* would be eliminated: the unity of private international law would exclude positive conflict between two systems of conflict norms (141).

The author also proposes 'intermediary solutions' before the utopian end-stage of universal private international law unification could be reached. Qualification must derive from the law by which the conflict norms have been established, and never unilaterally from the *lex fori*, because to interpret international conventions in the ways of national law means relapse into single-

state one-sidedness (140). 'Public policy' increasingly should be interpreted as the protection of international, instead of national, interests: the greatest difficulties could be removed in this sense even by way of treaties concluded by single states (140). A provisional regulation of *renvoi* would amount to national legislation deciding whether, or within what limits, *renvoi* might take place at all. Though the author rejects in principle both admission and refusal of *renvoi* at the present stage, yet as long as the problem cannot be eventually eliminated by private international law unification, uncertainty would be reduced by legislative solutions made known before the particular problem arises (141).

Scelle wrote a preface to this book. He compares the solutions offered by two of his admirers: Kopelmanas and Wiebringhaus. The former deems perfect unification under international legislation utopian. He proposes, instead, that the national judge himself study the different foreign elements of a case and evaluate, sometimes successively, their importance in order that the chances of realization may be the greatest for the legal situation in question. The method of Kopelmanas, acccording to Scelle, is a generalization of the system of *renvoi*. But Scelle likes Wiebringhaus' solution better, no doubt because it is more 'universalistic.' But is it also less utopian? Scelle thinks it is utopian to hope that national judges have a universal knowledge of foreign legislations, and be totally disinterested as to their own nation (12). But is it less utopian to expect unification of private international law by way of international legislation? Scelle remarks that the two approaches are not irreconcilable: this would mean that two utopias add up to reality.

The real merit of Wiebringhaus is to have shown that the basic idea of '*dédoublement fonctionnel*' applies to private international law no less than to public international law. His attempt to mediate between particularist and universalist views of international law merits attention mostly on account of his demonstration that basic problems cannot be solved from a perfectly particularist point of view. To be sure, the demonstration itself may not be conclusive, but correctly delineates the precise point in question between the opposing theories. Like the double function theory itself, Wiebringhaus' application of it to private international law is basically an 'as if' solution: it may be that we reach better solutions if we assume the hypothetical oecumenical law as already existing. As compared to Kopelmanas' solution, however, Wiebringhaus gets involved in farflung questions of international politics which go much beyond the exigencies of the private international case in hand. The former offers a 'from below' solution, while the latter proposes a 'from above' solution. There may be some asymptotic point of contact between the two, as Scelle hopes, but for methodological reasons a solution which sticks to the empirical facts of the concrete situation seems to be preferable to one which from utopian abstractions deductively arrives to ready-made concrete decisions, is unnecessarily mixed up with politics, and even in the subtitle of the book reveals that it is less tolerant as universalist than he is as particularist.

If we turn now from the 'conflict garden' to the agitated waters of general jurisprudence, we meet first Friedrich, who advocates a radical philosophy of experience, but dissociates himself from empiricism by extending experience to emotion, will, creation, and even the "logical component" of thought (3). He thinks the hypotheses of causality and freedom, or determinism and indeterminism, cannot be reconciled because, the "logical component of human behavior" being itself a part of human experience, the result simply is not calculable. Accordingly, he stresses the *problematic* character of philosophy and adopts the basic hypothesis that, without such all-embracing problematics of all experience, law can be portrayed only artificially and full of contradictions (4). This gloomy forecast is hardly borne out by the sequel of a lucidly written book which mostly sticks to commonsense. So the reader is relieved from solving the puzzle: if contradiction is inherent in all-embracing experience, how can law be portrayed free from artifice and contradiction by taking resort to such inherently contradictory experience?

In his survey of the history of legal philosophy, Friedrich has trenchant and relevant remarks on the Old Testament, the Stoa, the Humanists, Rousseau, Kant, and Hegel, and the revival of natural law in Europe and America. He seems to be less trenchant or relevant insofar as either the classical Greeks are concerned whom he admires, or the great medievalists, Hobbes, and the utilitarians, and especially the modern "relativists, formalists, and skeptics," toward whom the main thrust of his criticism seems to be directed.

In the outline of his own legal philosophy, he speaks of justice, authority, and legitimacy, order and breach of law, constitutional law, and world law. The outcome is a rather complicated definition of law as a system of rational rules, based upon human experience, directed towards the realization of justice, created in participation with the members of the legal community on the basis of a fundamental law, and fed by the constantly renewed community of such members (143). This is obviously the definition of a perfect or ideal type of law: a world law within the framework of a world constitution is certainly in line with it, but the author has to admit that international law at present is better characterized by admitting that "it is a matter of world outlook, that is legal philosophy, whether an order so deficient and frail deserves to be called law" (142).

Speaking of the revival of natural law, Friedrich notes a certain turn towards the legal process, characteristic of the Anglo-Saxon emphasis on procedure as decisive for the rule of law. This is certainly an important point, well taken as the realistic aspect of the more substantive variety of the fundamental rights of man. However, the 'problematic' character of Friedrich's treatment of legal philosophy reappears in his handing over the problem of justice to politics (121). Even though he seems to believe in the rational 'component' of man, not limited to an "intellectual elite' (124)—and even though he makes constitutional democracy dependent on this hypothesis (123)—he defines 'authority'—the indispensable basis of both legitimacy and legality—as reason

'augmented' by the judgment of the 'elders' or the 'learned' (127): a typically aristocratic conception. Again, the point is well taken that a constitution is the result of a decision by a people to limit itself in the exercise of power (139). But the inference, that realistically the power of 'policy decision' ought to be limited in the first place—rather than legislative power as limited in the first place by most constitutions—is not beyond doubt. Expecially as a remedy against totalitarianism, it sounds as a counsel of despair rather than a remedy.

Fechner, like Friedrich, extends experience beyond sense experience and rejects empiricism in the sense of the science of nature (287). But going much beyond Friedrich, and especially flirting with depth psychology and existentialism while openly professing his adherence to the post-Neokantian objectivism of critical realism in the wake of Husserl and Scheler (7), Fechner qualifies the experience of law, the sense of justice, as based on metaphysical experience (289). Characteristically, he defends himself against the charge that his chapters on natural law and existentialism may be regarded as involving 'unbridgeable contradictions' (290).

The outcome is a complex definition of law: "Law is both of these things at the same time: regulation of human relations on the basis of data empirically determined, and always renewed inner decision on the basis of inner processes which cannot be rationally grasped" (292). Accordingly, philosophy of law is at the same time a sociology of law and a metaphysics of law, depending on whether law is seen in its causal determination, or as a result of free decision (293). The most obvious objection to this methodology is the question: how sociology of law may be qualified as philosophy in the same breath as metaphysics of law is so qualified. The latter is defined as directed to the ultimate, absolute, irreducible elements, reasons, and causes of law (292), whereas the former is defined as "*Einzelwissenschaft*" and even as a "science of nature" (267).

Fechner inquires especially into biological, economical, and political factors of law, on the one hand, and its rational, value, and religious factors, on the other hand. He finds both the realistic and idealistic conceptions of law one-sided and tries to classify the different factors. He arranges them according to whether they can be reduced to more basic structures, or to each other, and also according to their interdependence and proximity to law. Perhaps characteristically, the 'power theory of law' is chosen as the true 'realistic' theory of law (118). Anyway, the biological factor is said to be the least manageable, the economic factor more pliable, whereas the political factor is the most changeable. A similar series obtains among the three ideal factors. This leads to the conclusion that, while law is to a great extent objectively determined, or at least conditioned—Fechner speaks of "*Eingebundensein*"—there still remains room for free choice. This availability of rational choice proves to be the umbilical cord between natural law and existentialism.

In the preface, Fechner admits that, while the ontological kernel of his view had been formed during the war and his life as prisoner of war "under the clear

sky of France," his ideas about Scheler's doctrine of operative factors have emerged only as he wrote the manuscript (VI). This may be responsible for his uneasiness about whether the enumerated factors: "Bios, Oikos, and Polis; Logos, Idea, and Theion" (112) are indeed well taken, or separable at all. It might be asked, for example, whether biology has a place among the *social* factors if psychology, or geography, are excluded. Similarly, logic (or reason) stands out among his 'ideal factors' as not belonging to the same order as value and religion, both heavily loaded with substantive (alogical) meaning, whereas reason is merely formal (but applies to real no less than ideal factors). Nor does he examine the question of change: does law arise, develop, or disappear as an effect of the operation of these factors, or is it merely limited by them in its operations? He is rather puzzled by the problem that the ideal factors already operate as integrative forces within the real factors (122), and asks whether the close interrelationship of both groups of factors is not a sign of their deeper unity (124)? Referring to Revers' personalistic interpretation of biological urges, according to which the urges themselves already are structured in a personalistic sense, Fechner hopes that the image of law might become more unified than he succeeded in rendering it on the hypothesis of unbridgeable dualism (126). The same idea returns with the archetypes of Jung. These are the images acquired in the course of phylogenetic experience of millenia, restoring in the subconscious collective mind the unity of man and world. The principle of reciprocity, the social appetite, and monogamy are interpreted in this sense. And Fechner frankly admits that this means reduction of something supposedly spiritual to something empirical and psychological (172). Even though the archetypes merely torment and disquiet the individual who acts against their warnings, but give no direction to his action, he claims that they close the circle and suggest the unity and interdependence of rational and deductive justification of law, on the one hand, and its empirical and realistic verification, on the other hand. In other words, they show law's objective basis in reality and, at the same time, its dependence on man's free choice and decision (175).

While rejecting the idea of an absolutely immutable and rigid order, the author lays great stress on objective factors and finds in them the imperishable idea of natural law in a new form, characterizing as a main point of his book his endeavor to demonstrate the objective character of law (189). He outlines an ontology of law, the basic argument being that law is a partial order within an embracing overall order of the universe. Justice is basically ontological: conformity to this cosmic order. The particular character of law is that it is in part given and in part set as a task (203). Law is self-explanatory because of this ontological justice. What is right, or lawful, is what is natural, proper, and obvious, because it is explained by the thing itself (204). Perhaps the finest expression of the author's ideas is in the following words: "In the vast void of the universe occur concentrations of energy in wonderfully structured form beginning with the dances of particles within the atom and ending with the

immense astrophysical pageantry of the stars. In these concentrations of energy further admirable units of force and order arose in living beings, the highest form known to us being man, put in this tension between nothing and something, chaos and form, a tension he tries to bring to an end. In this objective context of governing laws is seen the justifiable kernel of the doctrine of natural law, importing immutable laws of things and objective principles" (208).

This obvious, self-explanatory (*selbstverständlich*) character of law, deriving from the fact that it belongs to the orders dependent on reality rather than to the free orders, not so dependent (213), is stressed in the chapter on natural law (204, 214). But in the chapter on existentialism the very idea is rejected: "after we have demonstrated that substantive principles valid for all law cannot be verified, no doubt is left but that we have to abandon the idea of natural law which supposes the validity of such superpositive norms as obvious (*selbstverständlich*)" (261). Still, Fechner adopts the idea of a natural law in the making: the genuine existential decision is nonetheless bound in regard to the future in which something objective develops out of what previously had been merely subjective. Such daring (*Wagniss*) to test something new in a space, the structure and laws of which are but imperfectly known, leads to the idea of natural law verified in the making: subjective in its origin and objective in its goal. This objective character of the attempted goal is the kernel, and utmost claim, of natural law doctrine (261). The question whether behind this natural law in the making another ready-made natural law was hidden from the beginning, cannot be answered, since such natural law cannot be verified (262).

The final product is thus naturalistic, even though the author does not seem to admire 'one-sided' naturalism. There is also much hesitation about the role of reason (pp. 98, 100, 108, 163, 249, 250, 251). The saving device in spanning the chasm between his initial objectivism and subsequent existentialist subjectivism is the idea that law is a partial order within the social and cosmic order. The presentation would only gain if the author were to abandon flirtation with fashionable trends not at all "*stilverwandt*" to his own basically objectivistic view, and would not indulge in speculating on realms of objects of which we know nothing.

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Book Notices

RICCA-BARBERIS, M. *Di alcune voci e non soltanto giuridiche*. Torino: G. Giappichelli, 1957. Pp. 63.

In a speech delivered to a conference of lawyers in São Paolo, Professor Couture had correctly stated that words can increase in their meaning and importance. Professor Ricca-Barberis undertakes in this book to examine ten words of this kind. For example, the word "possession" today has an entirely different meaning than that given to it by Paulus; the concept of "eviction" should also be dematerialized as proven by the author who traces its modification along a path from Athens to London and New York. "*Auctoritas*" should no longer be confused with "*potestas*"; similarly, the several different meanings of the word "*autarchia*" in the Italian language should also be kept in mind. "*Dare*" is sometimes taken in a meaning different from that of the Roman "*dare*" which implied a transfer proper of property. With reference to the word "*dote*" (dower) the author examines the institution of community property of spouses under different legal systems. With regard to the institution of bankruptcy, he points out the various inconsistencies with special regard to the French decree of May 20, 1955. The word "guarantee" should refer to acts of third persons, while "*responsabilità*" to the acts of the contracting party. With regard to the acts of the seller, the author refers to his article on the same topic in 41 Revista de derecho privado (1957) 485–507.

In many languages the term "shark" indicates in a figurative sense those enriched during the war. In this context, the author points to the illusory remedy of the action for unjust enrichment, which was introduced by several legislations; in his opinion, the institutions of implied contract, of *negotiorum gestio*, money had and received, or of subrogation in actions might just as effectively substitute for unjust enrichment. This action, on account of its vague and indeterminate nature does not always succeed in hitting the real "shark" while at times it damages persons who are innocent.

The British Year Book of International Law, 1954, edited by Sir Hersch Lauterpacht. London: Oxford University Press, 1956. Pp. viii, 531 and (Table of Cases and Index) 15 pp.

The British Year Book of International Law, 1955/6, edited by Professor C. H. M. Waldock. London: Oxford University Press, 1957. Pp. viii, 357 and (Table of Cases and Index) 9 pp.

The British Year Book of International Law is now, of course, an institution, and it is interesting to recall that on the occasion of its inception in 1921 its editorial board declared that it had "been established because its promoters feel that a wider knowledge and comprehension of the subject is essential at the present time, and that a British periodical devoted to international law would help to this end."

During the thirty-five years since the Year Book's establishment, international law has become a very fashionable topic among writers, some of whose contributions to the subject have been of great value, and some utter rubbish. It is refreshing to see, in the two latest issues, that the British Year Book of International Law has not departed from its usual (some might say inevitable) high standard, and all the contributions are of considerable interest: all are of value in assisting to an understanding of international law to-day, especially since this is a period in which many are beginning to doubt whether

international law is as efficacious as many learned writers would seem to like to think it is.

It is invidious and unfair to single out separate articles for comment, especially when all are of such a high standard: however, invidiousness and unfairness are well-known characteristics of reviewers who are invariably frustrated by considerations of space and dead-lines. There is a valuable and thoughtful article by Dr. Jenks, who needs no introduction, on the scope of international law ((1954) B.Y.B.I.L., 1), and a searching survey of the Plea of Domestic Jurisdiction before International Legal Tribunals by the present editor, Professor Waldock. (*ibid.*, 96) Both of these articles are significant contributions to the study of international law. In the field of conflict of laws there is an extremely learned article by Dr. F. A. Mann, "The Time Element in the Conflict of Laws" (*ibid.*, 217): although it is at times difficult to grasp, on a first reading, exactly what he intends to convey, further study of the learned writer's article reveals some interesting features of the conflict of laws which have not previously been explored. Dr. Mann does not always confine himself to consideration of English law, and makes some valuable observations in the comparative law field. Mr. I. M. Sinclair has contributed a study of Polygamous Marriages in English Law (*ibid.*, 248), and puts forward some original views, among them that "the House of Lords decided in the *Sinha Peerage* case that a marriage polygamous in inception could be converted into a monogamous marriage by a change of religion of the parties subsequent to the marriage." (*ibid.*, 250). It is said that this view is "clearly inconsistent" with *Mehta* v. *Mehta* [1945] 2 All E.R. 690, and involves "a repudiation of the principle established in *Hyde* v. *Hyde*" (1866), L.R. 1 P. & D. 130. The better view, however, would seem to be that in both the latter cases the courts were considering the question of polygamous marriages in relation to divorce jurisdiction of the English courts, while in the *Sinha Peerage* case the House of Lords was considering whether the issue of what was in its inception a potentially polygamous marriage was entitled to make peerage and establish his descent in peerage law from his father. Surely this has nothing to do with the question whether an English court will in its divorce jurisdiction dissolve or adjudicate on a polygamous or a potentially polygamous marriage. Nor was the House of Lords concerned with "recognizing" a potentially polygamous marriage, but with recognizing as "legitimate" the issue of such a marriage. These are entirely different questions. It is encouraging to note that Mr. Sinclair, in a later section of his article, rejects the doctrine of the law of the "intended matrimonial domicil" as conferring marital capacity (*ibid.*, 260).

In the 1954 volume of the Year Book, Dr. G. P. Barton has contributed the third in his series of articles dealing generally with jurisdiction over visiting armed forces. This article, entitled "Foreign Armed Forces: Qualified Jurisdictional Immunity", appears at p. 341: Dr. Barton's earlier articles have appeared in (1949) 26 B.Y.B.I.L. 380, and (1950) 27 B.Y.B.I.L. 186. These contributions, in a little-explored field, are of particular value and are, as far as this reviewer can judge, completely exhaustive of the separate topics dealt with. It is to be hoped that Dr. Barton will enrich this field with further articles.

The 1955/6 Volume of the Year Book has come out under the editorship of Professor C. H. M. Waldock, Professor (now Sir Hersch) Lauterpacht, who contributes a moving tribute to the late Professor Brierly (*ibid.*, 1), having been elevated to the Permanent Court of International

Justice. A subject of considerable topical interest is dealt with by Mr. D. H. N. Johnson, who writes on the effect of resolutions of the General Assembly of the United Nations (*ibid.*, 97): his acute and revealing comments are well worthy of attention. Professor Norman Bentwich contributes an interesting article on the international aspects of restitution and compensation for victims of the Nazis (*ibid.*, 204), and Dr. G. C. Cheshire supplies what is perhaps not a particularly enlightening comment on the recent Conflict of Laws case, *The Assunzione* [1954] P. 150, which is another in the long line of cases in which the English courts have attempted to discover what was the proper law of a particular contract when the parties themselves had expressed no intention regarding the matter.

The fact that a number of articles have not been mentioned here does not mean that they are below the high standard the British Year Book of International Law has set itself. All are of considerable interest and value: and it should be said that the same is true of the book review section. The volumes are available separately.

B. D. INGLIS

RACKMAN, E. *Israel's Emerging Constitution 1948–1951.* New York: Columbia University Press, 1955. Pp. xvi, 196, including Bibliography (7 pp.) and Index (10 pp.).

After laying down Mr. Bloomfield's unhappily-conceived exploration of the Egypt-Israel Gulf of Aqaba dispute, reviewed elsewhere in these pages, it was a genuine pleasure to read Dr. Rackman's fascinating account of the development of Israel's basic law during the three years following its establishment. For once the publishers, in their note on the front flap of the cover, have not exaggerated when they say that this is a "splendid volume."

No one need be misled by the description of the establishment of Israel in Dr. Rackman's Introduction (p. ix) as "a miracle from Heaven" or, at least, "well-nigh wondrous," into thinking that the author is about to devote his text to a paean of praise of everything Israel has done in the constitutional field. The remarkable thing about his text, which deals largely with political matters, is its essential saneness and balance: one is left in no doubt that the author is stating every point of view with scrupulous fairness.

Dr. Rackman, in a remarkably small space, gives us a surprisingly full treatment of such matters as the pre-1948 constitutional antecedents, such as the World Zionist Organization and the Jewish Agency, the Knesset Israel, the Provisional Government, and the Palestine Commission. He discusses the various political parties and their views on the constitution (This discussion, occupying Chapters II and III, is of particular interest), the Fundamental Principles of the first Knesset, and, in short, deals with almost every aspect of the problems surrounding the development of constitutional principles in the Israeli context.

In Chapter IX, Dr. Rackman goes very fully into the religious problems in Israel's legal development: when he deals with the subject of religious and secular schools and state support for religious communities, he is inclined to be somewhat apologetic, having, presumably, the American reader in mind, and the American constitutional guarantees regulating these problems. No apology is really necessary, however. In this respect Israel resembles England, which has an established Church and no written constitutional guarantees whatever of freedom of religion, far more than it does the United States, with its enormous mass of people holding widely different religious views. As Dr. Rackman says (at p. 169), most Israelis "believe that the ultimate

preservation of democratic institutions depends less upon constitutional guarantees than upon the general consensus of the land's inhabitants."

This is the type of book of which little can be said in a review of this sort: it should be read to be fully appreciated. In his introduction, the author says, with touching modesty: "Perhaps I did dream of writing an inspired book that would reveal the mystery and essence of all that transpired in the early years of the world's youngest democracy. . . . Instead, my book is limited to one small area—and perhaps even that area was beyond my size. . . . [It is] my offering to the men and women whose heroic accomplishments have won the admiration of noble people everywhere. Even when I am critical of what they have done, I seek to be constructive in my analysis." It is perhaps not an overstatement to say that Dr. Rackman has fulfilled his purpose more admirably than he himself suggests. This book is essential to anyone who wants to be fully informed about Israel's constitutional development and structure, and is a very fine and constructive contribution to a better understanding of Israel's internal and foreign problems. It is unnecessary to add that the writing itself is beyond criticism.

B. D. INGLIS

BLOOMFIELD, L. M. *Egypt, Israel and the Gulf of Aqaba in International Law.* Toronto, Canada: The Carswell Co. Ltd., 1957. Pp. 240, including Appendix (55 pp.), Bibliography (5 pp.), Table of Periodicals and Journals and Official Documents and Publications (2 pp.) and Index (10 pp.).

There are some people who believe that in the light of the then existing Middle Eastern situation the time and the manner of the establishment of the State of Israel was the most tactless blunder in regard to the Arab states this century has seen. Others believe that if Israel had not been established when it was, it would never have been established at all, and that for various reasons its establishment was essential and inevitable. Both these views are extreme, but whichever is nearer to the truth, the fact remains that Israel is there to stay, and the resulting problem of Middle Eastern relations presents a grave challenge to the forces of world peace and order.

An intelligent and unbiased study of the present-day relations between Israel and her Arab neighbors in the light of concepts of international law and the practical realities of the situation would have been of considerable value. It is a topic of almost vital current interest, and there is certainly a need for definitive treatment of it. It is to be regretted, therefore, that Mr. Bloomfield found it necessary to approach his subject with the view that (as he says in his Introduction) "this is not the time, nor is there now an opportunity to write a definitive text on the contentious issues outlined in this volume." Mr. Bloomfield's text is certainly far from definitive in any sense, and the work as a whole bears every appearance of having been thrown together with undue haste.

If hasty preparation were the only fault to be found in this book, it might be possible to find some way of recommending it. The author, however, although he is described in the advertisement on the back cover as "a leading international lawyer and author" is misled into devoting himself, when he deals with the position at international law as such, to points of extreme technicality which bear little or no relation to matters as they exist.

Even an undue reliance on extreme (and, it should be said, unreliable) technicalities might not make this book entirely unacceptable, but possibly a worse fault (which is probably what gave rise to the one just mentioned) is that Mr. Bloomfield leaves the reader in no doubt whatever as to

which side he is on, but in a manner which leads the reader to suspect that he has overemphasized the Israeli case out of all proportion to its actual merits, legal or otherwise, and either has not, or does not reveal that he has, any understanding whatever of the Egyptian and Arab bloc side of the dispute.

These general remarks should be sufficient to indicate that this book is unlikely to be of much interest or assistance to anyone who is not so ardently in support of Israel's position as to be willing to believe that the one side is pure white and the other deepest black. Most of the Western nations agree that the Arab bloc's activities toward Israel in relation to the Gulf of Aqaba and the Suez Canal are unjustified and cannot be supported, and most people who are not blinded by undue sympathy for the Arab nations' view that whatever is in their interests is legal, would agree. It is, however, one thing to reach a reasoned conclusion on the merits of a dispute, after a full consideration of the arguments on both sides, but quite another thing to insist that one side is totally wrong without revealing that its point of view has been intelligently considered. Mr. Bloomfield's position is not one of an impartial observer, and it is greatly to be regretted that in his extreme advocacy of Israel's position he has missed the opportunity to provide a reliable source which others would find of value in assisting them to make up their own minds on the situation.

Enough has been said to make it clear that more than general criticism is required. Mr. Bloomfield's principal thesis is that, since the justification for the Arab nations' interference with shipping in the Gulf of Aqaba and the Suez Canal is the Arab nations' declaration that they are in a state of war with Israel, and since "no state of war exists between Egypt and Israel" (p. 164), such interference is illegal at international law. Mr. Bloomfield seeks to establish this somewhat amazing proposition by maintaining that no war exists between the two countries "because both are members of the United Nations Organization," and because such conduct is "incompatible with the obligations and duties of member states" (*ibid.*, and see also p. 53).

Whatever the strictly technical position may be under the United Nations Charter, this reasoning is so plainly unsound in the light of practical realities that it can hardly be taken seriously. Nor is it any more helpful to suggest that the 1949 Armistice Agreement terminated whatever state of war may have existed (p. 55): Mr. Bloomfield does not mention *Commercial Cable Co.* v. *Burleson*, 255 F. 99 (1919), in which it was succinctly said that "an armistice effects nothing but a suspension of hostilities; the war still continues," which appears to express the view held generally on the matter. Mr. Bloomfield would, it is suggested, have been on safer ground had he directed his enquiry to the question whether, since Egypt does not recognize Israel as a state, a nation can logically be at war with another state which it says does not exist. As it is, however, Mr. Bloomfield's possibly most valuable point is that many nations have recognized the Gulf of Aqaba as an international waterway, which would at least appear to dispose of the Arab nations' claim to territorial sovereignty over it.

In places Mr. Bloomfield arrives at conclusions which do not seem to be adequately supported by the authority he cites: for example, it can hardly be inferred from the remarks of the President of the 413rd Meeting of the Security Council on March 3, 1949, reproduced on p. 38, that "it is perfectly obvious . . . that . . . a state of war did *not* exist": the italics are the author's. Similar instances of this tendency appear on p. 45. Other

passages, such as those in which the author suggests that a unilateral declaration of war cannot be binding on the United Nations, for which no authority is cited, (p. 53), appear to be of very doubtful validity.

A word should be said about the form of presentation. Mr. Bloomfield cites long passages from various documents, some of them in the original French (*e.g.* at pp. 12–13, 99, 112–113, and 133): as not all his readers are likely to be multi-lingual, it is surprising that the author did not think that it might be convenient to provide translations. In fact, he does provide a translated passage (but without the original French!) on p. 51. It is even more surprising to find a passage from Grotius, *De jure belli ac pacis*, reproduced in an unidentified and apparently modern French translation (p. 99): Mr. Bloomfield might at least have provided us with the original Latin, or better still, the relevant extract from one of the reliable English translations.

Some of the citations of periodicals and case reports are distinctly odd: no self-respecting Law Review editor would ever pass "(1952), 343 u.s. 341" as the reference to *Madsen* v. *Kinsella* (p. 30, note 10); and it is not clear why the author cites the American Journal of International Law as "(1953), 47 Am. J. Int. L. 300–08" on one page (p. 30, note 10), and as "American Journal of International Law (1945), Page 286" two pages later (p. 32, note 14). It is somewhat startling to see the commonly used "*op. cit.*" faithfully rendered as "opus cited". The use of capital letters in titles of various treatises and articles seems to have caused some difficulty: *e.g.*, at p. 81, note 3, "Le Droit International Public de la mer". The type-face chosen by the publishers is unusual and somewhat arty in appearance, and is not (to this reviewer) quite as easy to read as the style of type normally adopted in standard legal publications.

There does not seem to be any point in continuing this rather depressing recital of the defects and drawbacks of this book. It can hardly be described as a scholarly work. Most lawyers will probably be irritated by the way in which the Israeli case is continually overstated, by the sometimes fantastic arguments used to support it, and by the complete lack of any sort of reasonable appraisal of Egypt's case and that of the other Arab states. It is unlikely that much of it will be understood by the average layman, who is, if he reads it, likely to obtain a quite unbalanced picture of the position (although Count Bernadotte's name is mentioned on several occasions, there is no indication whatever which side was responsible for his assassination).

It is most unfortunate that this book, written no doubt with the best intentions, is generally unacceptable. Israel has a good case, and has submitted most patiently to interference from her neighbors which a nation with less moral background would not tolerate. But Israel's case could be stated far more convincingly and much more plausibly than Mr. Bloomfield's efforts would lead us to believe. It is true that this book is useful as providing references to and extracts from the various United Nations documents dealing with the dispute, but it is doubtful whether it is worth paying $5 for this information.

B. D. INGLIS

RIE, R. *Der Wiener Kongress und das Völkerrecht*. Bonn: Ludwig Röhrscheid Verlag, 1957. Pp. 173.

The chief merit of this book is the wealth of hitherto unpublished material collected in the Archives of Paris, Vienna, and Munich. This, together with a thorough appraisal of the literature on the subject, serves as the basis on which the author inquires into the immediate prehistory of the Congress (p. 9–33), its character as an international collegiate authority (p.

34–48), legitimacy as fiction applied to public and private law (p. 49–77), the concepts of 'tranquillity,' 'disturbance,' and 'usurpation' (p. 77–97), 'balance of power' as a principle of international law (p. 97–122), and the superiority of international law over private and public law (p. 122–154).

After a thorough examination of the factors favoring or countervailing the basic principles which inspired the Congress, the author concludes that the pure principle of legitimacy has been shattered: "between the Revolution and historical-social legitimacy stood the international law of Napoleon's era: the 'legitimacy of treaties' as a principle of equalization and legal security" (p. 77).

Whereas the principle of legitimacy is understood as 'pure structure'—that is to say, a mere auxiliary device—the principle of balance is regarded as genuine. The author develops a theory to the effect that equilibrium of forces tending to aggression and defense may, in a primitive society, safeguard reciprocal interests in a way analogous to the function of law in more developed society. He classifies the Monroe doctrine, a late fruit of the Congress of Vienna, as an example of a law-like state in the sense of the doctrine of balance (p. 109). After Waterloo, the powers speak no more of legitimacy, but of balance and reciprocity. The latter means mutual, but equivalent, changes on both sides. This was taken so seriously that, on the basis of statistical data, areas were adjudicated according to the principle: square mile per population. This yields a three-dimensional number which—by addition of a guarantee of territorial integrity—grows into a four-dimensional *corpus mysticum* (p. 116). The fourth dimension is time; territorial integrity, or inviolability, also amounts to tranquillity of Europe. This was the concrete idea of balance which, together with 'sacred'—that is to say, immemorial, morally justified, inherently legitimate—rights, added up to international law (p. 118). For instance, denouncement of an armistice before the term agreed upon, was regarded as violation of an absolute prohibition sanctioned by the law of war. It was regarded both as a violation of a sacred right and of the balance of Europe. The author explains this by his theory that balance in international society produced a law-like state, while an armistice produced a peace-like state. In this sense, balance is analogous to an armistice in primitive society, whereas an armistice is a stabilized state of balance among belligerents (p. 120). The idea of 'sacred rights' leads to the work of the Congress in matters of human rights, and progress toward establishing an European legal community. Among the highlights, Swiss neutrality, abolition of slave trade, adoption in principle of emancipation of the Jews, parliamentarism in federal states, and international river law are discussed (135).

The lesson drawn from a thorough study of the work of the Congress of Vienna is that it proved durable because ideas of retaliation or vengeance were absent. After one of the most propitiatory of conciliatory peace treaties ever concluded, the victorious powers still sought to achieve even more intimate mutual understanding and hereby to secure an even more solid legal foundation upon which to build. Especially the brilliant work of Talleyrand and the mediating role of Emperor Francis are featured persuasively.

BARNA HORVATH

KIRALFY, A. K. R. *A Source Book of English Law*. London: Sweet and Maxwell Ltd; Toronto: The Carswell Co. Ltd. 1957. Pp. xx, 440 and (Index) 5 pp.

American law teachers may be interested to learn that the practice of producing case books has in recent years spread across the Atlantic. Al-

though it has not yet become fashionable in England for everyone to produce a case book on every conceivable topic, the last ten years or so have seen about six English case books come on to the English market, and this is the latest.

Dr. Kiralfy's case book is not only the latest to come on the English market, but it is also the first to deal with English Legal History. It is intended to provide a collection of authentic materials covering all the principal fields of the law, and throughout Dr. Kiralfy has had three aims in mind: to use materials which illustrate substantive and adjective law at the same time, which not only clarify some historical development but also show the operation of the machinery of justice; not to encroach to too great an extent on other collections of source material, such as Fifoot's *History of Contract and Tort*, Digby's *History of Real Property*, and the Selden Society publications; finally, to follow the general order and subject-matter of Potter's *Historical Introduction to English Law*, so that the case book might be used as a companion volume.

It is somewhat staggering to contemplate the amount of labor which must have gone into compiling the materials which Dr. Kiralfy makes available to us. There is no doubt whatever that this is a valuable collection: some of the cases were previously inaccessible, most of them are interesting, some are fascinating, and some are highly entertaining. It is easy to see that Dr. Kiralfy's book will provide an excellent basis for a course in English Legal History.

English Legal History is not at present taught in the majority of law schools in the United States, in spite of the fact that (as Dr. Kiralfy remarks in his preface) "there can be few fields of legal study so appropriate as an academic discipline." It might be suggested that some of this country's larger and more financially independent law schools might seriously consider discarding some of the more obvious bread-and-butter subjects (which can, in most cases, be just as easily picked up by the student when he joins a law office) in favor of a subject which provides some depth of legal background. If this is ever done, and legal history is chosen as the subject, it is to be hoped that Dr. Kiralfy's case book will be chosen as the basis for such a course. It is highly recommended.

B. D. INGLIS

LIEBERWIRTH, R. *Christian Thomasius. Sein wissenschaftliches Lebenswerk. Eine Bibliographie.* Arbeiten aus dem Institut für Staats- und Rechtsgeschichte bei der Martin-Luther-Universität Halle/Wittenberg. Weimar: Hermann Böhlaus Nachfolger, 1955. Pp. 213.

On January 1, 1955, the Martin Luther University of Halle/Wittenberg celebrated the three-hundredth anniversary of Christian Thomasius, and the present bibliography was prepared as part of the commemorative publications. Thomasius, who was compelled to escape his native city Leipzig on account of his ardent defense of the freedom of science—an act indeed familiar to many of his contemporaries and surely frequently repeated in later times,—found asylum in Halle, where he became one of the founders of the University, and was able to work in an atmosphere of intellectual independence auspicious for his ideas to develop into one of the most influential *oeuvres* of the German Aufklärung. One point of interest: contrary to the then prevailing habit of writing only in Latin, Thomasius published many of his writings in German, as early as 1690, "*Freymüthige und Ernsthaffte iedoch Vernunfft-und Gesetz-Mässige Gedancken*," "*Einleitung zu der Vernunfft-Lehre*," *Die neue Erfindung. . . . das Verborgene "des Hertzens anderer Menschen auch wider ihren Willen aus der täglichen*

Conversation zu erkennen," which is, contrary to the title, not a forerunner of Freudian theories but the expression of his famous and since oft-quoted tenet ". . . . it is only unlimited freedom that imparts true life to all thought."

This bibliography of Thomasius' works, impressive not only in its volume, but also on account of its unique feature in summarizing and annotating the works listed, gives an excellent survey of the wide range of ideas encompassed by this fertile genius. The list of publications begins with the year 1672 and ends in 1726; it includes writings on theology, education, science, and above all, law. The problems of his primary preoccupation were natural law (*Institutiones Jurisprudentiae Divinae*, 1688; *Fundamenta Juris Naturae et Gentium*, 1705); the relation of the individual to the state (*De duplicis maiestatis subiecto*, 1672; *Decas Thesium . . . . suum quique*, 1694; *De iure Statuum Imperii*, 1696); Roman law; and expositions on contemporary problems in private law, among others, annotations and expositions of Ulric Huber's works published in the *Acta eruditorum* of 1682 and 1684. His works on legal philosophy show an amazing likeness to the pure theory of law of the Twentieth Century, especially his clear line of division between ethics, law, and morals, and the coercitive function of law over the *external* manifestations of human action, while his substantive rule, "Do unto yourself what you would that others did unto themselves," is in clear anticipation of Kant's categorical imperative.

The value of this bibliography for comparative research is greatly enhanced by the last chapter which contains the list of works written on Thomasius. It begins with his contemporaries and ends in 1953, including the names of Bynkershoek, Vico, Kant, Jhering, Gierke, Husserl, Baldwin, White, and Windelband.

V. B.

Mr. Justice, edited by Allison Dunham and Philip B. Kurland. Chicago: University of Chicago Press, 1956. Pp. xi and 230 and (Index of Personal Names and Index of Cases) 8 pp.

RAMASWAMY, M. *The Creative Role of the Supreme Court of the United States*. Stanford, California: Stanford University Press, 1956. Pp. xiii, 127 and (Table of Cases and Index) 10 pp.

The ingenuous British visitor to the United States is frequently astounded to find that the political views or tendencies of the members of the Supreme Court bench should be regarded as of importance in any consideration of their opinions. He is even somewhat shocked when he recalls that under the English and Commonwealth judicial system (in theory at least) politics and the law are to the judiciary as separate as fire and water, and except in a very limited number of instances involving questions of "public policy"—and then only possibly—it is inconceivable that a judge should allow his own personal political outlook to influence his interpretation of the law in the slightest degree. The fact that this is apparently not so in the United States (Mr. Justice Musmanno of the Pennsylvania Supreme Court is probably an extreme example) is inclined to disorient him: certainly his feeling that this is not a good thing finds justification when he discovers that trying to extract some fundamental *ratio decidendi* from the Supreme Court decisions on the Interstate Commerce Clause is like trying to build a house on shifting sands.

All this is intended to indicate that the Supreme Court of the United States has (or, as Professor Crosskey would probably maintain, has conferred on itself) a rather unique position in the field of comparative constitutional law. There is nothing else

quite like it in the constitutional framework of other countries, and from time to time various writers have tried to define exactly what its function is. The two books presently under review give a picture of the Supreme Court's functions which will be of great interest to any reader, but both approach the question in different ways.

Mr. Justice contains nine short excursions into the lives of nine of the more influential and colourful figures which have adorned the Supreme Court Bench: Mr. Justice Holmes, Chief Justice Marshall, Chief Justice Stone, Mr. Justice Bradley, Mr. Justice Brandeis, Mr. Justice Sutherland, Chief Justice Hughes, Mr. Justice Rutledge, and Chief Justice Taney. All nine essays are by writers who are authorities on their subject, and all are very good indeed. The essays are, of course, valuable as miniature portraits of the personalities of the various justices, and anyone who wants to know (and every American lawyer *should*—at least—want to know) something about the nature of men who have exercised a profound influence on this country's constitutional ideals and concepts, without having to plough through full biographies, cannot do better than to obtain this book. The essays are, however, valuable in another and probably more important respect: that is, in the light they throw on what may best be described as the American judicial attitude toward the Constitution. This book is probably (superficially at least) more valuable than any of the constitutional treatises in introducing the student to a preliminary insight into the workings of the American constitutional framework. From this point of view, the essays are illuminating and stimulating, and encourage the student to seek further: this, one imagines, is one of the main aims of the book.

As far as the individual essays are concerned, there is surprisingly little variation in the high standard set by the book as a whole. Francis Biddle contributes a fascinating portrait of Mr. Justice Holmes, which is not in the least rendered less entertaining by the fact that so much has already been written about Holmes; Professor Crosskey supplies a most stimulating account of Chief Justice Marshall, which is all the more stimulating on account of Professor Crosskey's original views. Professor Dunham has written a miniature masterpiece on Chief Justice Stone, and so has Professor Freund on Mr. Justice Brandeis. Professor Swisher manages to intrigue us with his portrait of Chief Justice Taney. The fact that these essays have been singled out for separate (and, it must be admitted, rather inadequate) comment, does not mean that the others are not equal in interest or quality. All, as we have already said, are extremely good.

Mr. Ramaswamy is Senior Advocate of the Supreme Court of India, and his book on the creative role of the Supreme Court is a serious exploration of the function and influence of the Court in regard to general constitutional principles. Originally compiled as three lectures delivered on the invitation of Stanford University, the book deals with the Supreme Court and the Constitution, the Supreme Court and the Federal System, and the Supreme Court and Civil Liberties.

It will be remembered that India has recently adopted a federal system of government and a written constitution, and Mr. Ramaswamy's views will therefore be regarded with great interest. It is, however, perhaps unfortunate that the writer, when he deals with constitutional legal issues, has occasionally let himself be led into over-simplification and over-generalization: this is probably the fault of Mr. Ramaswamy's format rather than of Mr. Ramaswamy himself: one cannot become too involved when delivering a lecture.

Generally, however, the quality of the book is high, within the obvious limitations imposed by the fact that it was originally intended to be listened to, not read. Mr. Ramaswamy's remarks on the division of powers (pp. 108, ff.), where he briefly compares the United States, the English, and the Indian constitutional positions, are most illuminating. Mr. Ramaswamy is, incidentally, to be congratulated on his comments on *Bridges* v. *California*, 314 U.S. 252 (1941) (pp. 79–82). Although Mr. Ramaswamy sometimes tends to idealize the Supreme Court, his book provides an illuminating general comment on the Court's functions, and is certainly worth reading for that reason.

It is unfortunate that this review should have to be concluded with a bitter complaint, which is, it should be said, directed at the publishers of both books, and not at the authors. There seems to be a growing tendency in the publication of law books of general interest to place footnotes, not at the foot of the appropriate pages, as is usual, but at the end of the book, buried among the index and table of cases. This practice, to the present reviewer at least, is intolerably inconvenient, and it is difficult to see any valid reason for it. It may be that the publishers are concerned with sordid commercial aspects, and are frightened that if footnotes are put in their appropriate place the "ordinary reader" will immediately think that he is faced with an elaborate treatise miles over his head. If this is so, there is perhaps some excuse where the book is one which is likely to appeal to the non-professional reader. Both the books under review, however, are primarily liable to appeal to lawyers and others who are not in the least prone to be deterred by a sprinking of footnotes at the foot of the pages. Under the system adopted in the present two books, the time and energy wasted in leafing through pages trying to find the appropriate footnote is infuriating, and it is hoped that legal publishers will in the future discontinue a practice which is both senseless and aggravating.

B. D. INGLIS

KIENAST, W. *Untertaneneid und Treuvorbehalt in England und Frankreich. Studien zur vergleichenden Verfassungsgeschichte des Mittelalters.* Weimar: Hermann Böhlaus Nachfolger, 1952. Pp. xii, 356.

One of the central problems of medieval constitutional law is the oath of allegiance of the vassal and his reservation of faith as part of the oath which provides for the contingency to withhold his feudal duties if called upon to fight against the King (. . . *meo teneor iuvare . . . . contra omnem creaturam . . . . salva fidelitate mea . . . . dominum regem Franciae . . .*) or, in case he owes duties to several overlords, in favor of one or all of these (. . .*salva fidelitate mea . . . . comitis Burgundiae et salva ligeitate Guillelmi de Castellione. . . .*) The work of Professor Kienast, the result of researches over several decades, offers in its rich documentation, scholarly presentation, and the exhaustive treatment of historical-legal aspects a distinctive contribution to the still controversial problem. The question of the general right of resistance is not treated, except in the discussion of the chapter on the oath of fealty in England, the land of Magna Charta, where legal, moral, and religious considerations concur in the conflict between the duty to owe allegiance to the King and the higher duties to God. This medieval duty of obedience forecasts its shadows for modern times, for instance for the model of the "*Instrumentalmensch*," who absolves his conscience with regard to acts done or to be done not only against his sovereign but in defiance of all law and morals in reliance on the command of his

supreme master, be he called "*Führer*," (p. 94) Head of police, Head of the Party, etc.

The work discusses in two main chapters the feudal constitutional setup of France and the Anglo-Norman state with an exhaustive discussion in each chapter on the theory of the oath of allegiance and the reservation of faith in the respective countries, while a third chapter treats the vassal's conflict of duties owed to several lords and of the feuds against the King. In the coexistence of feudal duties, two main principles prevail: the quantitative or territorial principle and the principle of defense, both in the nature of a sort of "*dépéçage*" of feudal duties owed by the vassal to his overlords on the basis of their mutual pact of defense and protection.

It is to be hoped that the elaboration of this topic for Germany and Italy, as promised by the author, will be made possible in the near future and will thus complete the history and comparative aspects of this problem of outstanding interest of medieval constitutional law.

V. B.

KIRCHNER, H. *Abkürzungsverzeichnis der Rechtssprache auf der Grundlage der für den Bundesgerichtshof geltenden Abkürzungsregeln*. Berlin: Walter de Gruyter & Co., 1957. Pp. xii, 347.

This register of abbreviations used in German legal terminology is intended to supplement the first exhaustive register prepared in 1929 by Drs. Maas and Magnus, published by the editor of the present work. Naturally, the 1929 register is exceeded by far in the number and variety of the abbreviations and citations. The author is the Director of the Library of the *Bundesgerichtshof*, and as such eminently qualified for the compilation and editing of current citations, which are, as indicated in the title, based on the rules of citation used in the practice of the German Supreme Court.

The various chapters of the register are well-adapted for thorough use as well as for quick reference. One of the chapters contains the general index of citations in alphabetical order; the following chapters give the citations currently in use; the abbreviations of the names of governmental authorities and offices of outstanding commercial public and private organizations and corporations. Of special value are the chapters on the citations of the official governmental and legal publications, and the citations of legal periodicals, as well as the most important legal treatises and monographs. The last chapter contains the official citations of statutes, decrees, and various legal rules and regulations. A minor point for emphasis is the outstanding formal presentation of the volume: faultless print and handy format, which are certainly additional qualities for the use of a register of this kind.

V. B

Current Literature on Foreign and Comparative Law

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Columbia University

LIST OF RECENT BOOKS AND ARTICLES IN ENGLISH ON FOREIGN AND COMPARATIVE LAW *

I. ON COMPARATIVE LAW AND RELATED SUBJECTS IN GENERAL

1. COMPARATIVE LAW IN GENERAL

Books:

Articles:

Jolowicz, Herbert Felix: In memoriam. 1890–1954. Tulane L. Rev. **29:** 351–52, '55

Lawson, F. H.: Dr. Ernst Rabel and Dr. Elemer Balogh. Int'l and Comp. L.Q. **4:** 533, '55

Pound, Roscoe: Comparative law in space and time. Am. J. Comp. L. **4:** 70–84, '55

Schroeder, Oliver Jr.: Comparative law: a subject for American lawyers. ABAJ **41:** 928–31, '55

2. ACADEMIES, CONGRESSES AND INSTITUTES

Books:

International Commission of Jurists. Report of the International Congress of Jurists (For the rule of law). Athens-Greece, June 13–20, 1955. The Hague, 1956. 164 p.

Pan American Union. Dept. of International Law. Handbook. Third meeting of the Inter-American Council of Jurists. Mexico City, January 17, 1956. Washington, 1955. 157 p.

Articles:

Ancel, Marc: International Committee of Comparative Law inquiry on the organization and purposes of institutes of comparative law. General report. (transl.) Am. J. Comp. L. **4:** 248–68, '55

Comparative law conference at Munich. Int'l and Comp. L.Q. **4:** 55–56, '55

Cueto-Rua, Julio: The law institute of the Americas. J. Legal Educ. **8:** 101–106, '55

Gagnon, Claude: Report. Comparative Law Section. Can. B. Ass. Proc. **37:** 82–83, '55

Inter-American Bar Association Meeting in Dallas. ABAJ **41:** 1132, '55

The International Institute of Administrative Sciences Round Table at Oxford. Publ. Admin. **33:** 447–54, '55

Kahn-Freund, Otto: First International Congress of Social Legislation. Int'l & Comp. L.Q. **4:** 52–54, '55

* This list contains books up to and including 1956 and articles published between January 1, 1955 and December 31, 1955, and is the second interim supplement to *A Bibliography on Foreign and Comparative Law,* compiled and annotated by Charles Szladits, Parker School of Foreign and Comparative Law, Columbia University. Distributed by Oceana Publications, New York, 1955. (First supp., 5, Am. J. Comp. L. (1956) 341–390.)

Lederle, F. W. and Heady, Ferrel: Institute of Public Administration, University of the Philippines. Publ. Admin. Rev. **15:** 8–16, '55

National Committee of Comparative Law. [U.K.] Intl'l. & Comp. L.Q. **4:** 54–55, '55

New York State Bar Association. Report of committee on international law. N.Y.S. B.A. Rep. **78:** 281–324, '55

Stone, F. F.: The Louisiana State Law Institute. Am. J. Comp. L. **4:** 85–88, '55

The Washington Foreign Law Society. (Notice) D. C. B. A. J. **22:** 96–97, '55

3. BIBLIOGRAPHIES

Books:

Bedö, K. A. and Torsay-Biber, George: Legal sources and bibliography of Hungary. New York, 1956. 157 p. This work contains a brief survey of the sources of Hungarian law followed by a bibliography of laws, statutes and court reports, a selective bibliography of treatises (pre and post People's Republic) a list of translations of laws, a list of legal periodicals, and a list of the most important statutes.

A Bibliographical guide to the law of the United Kingdom, the Channel Islands and the Isle of Man. London, 1956. 219 p. A selective bibliography prepared mainly in order to introduce English law to foreign lawyers. Each list is preceded by a short introduction drawing the foreign lawyer's attention to peculiarities of English legal arrangement. This may prove useful not only for the comparative lawyer, but to American lawyers generally. The laws of Scotland, Channel Islands and the Isle of Man are briefly discussed.

Craig, Jean: Bibliography of public administration in Australia (1850–1947). Sidney, 1955. 183 p.

King Quan, L.: Introduction in Asia. A selective guide to background reading. Washington, 1955. 214 p.

Speeckaert, G. P.: International institutions and international organization; a select bibliography. Brussels, 1956. 116 p.

Sweet and Maxwell, Ltd, London. A legal bibliography of the British Commonwealth of Nations. 2 ed. London, 1955. vol I.—687 p.

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Bedö, A. K.: Legal sources and bibliographical information (Hungary). Highlights **3:** 273–75, '55

Brüel, Erik: 25 years of the Scandinavian Review of International Law. An acknowledgment. Act. Scand. Juris Gent. **25:** 1–2, '55

Gwóźdź, Fózef: Bibliographical information (Poland). Highlights **3:** 346–51, '55

Pundeff, Marin: Indexes to Bulgarian law. Highlights **3:** 101, '55

Rabinowitz, R. W.: Materials on Japanese law in western languages. Am. J. Comp. L. **4:** 97–104, '55

Sipkov, Joan: Legal sources and bibliographical information (Bulgaria). Highlights **3:** 269–71, '55

Taubenschlag, Raphael: Survey of the literature chiefly from 1953 till 1955. J. Jur. Papyrol. 9–10: 477–526, '55/56

4. COMPARATIVE LAW AND LEGAL EDUCATION

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Articles:

Brownlie, A. R.: Universities and Scottish legal education Jurid. Rev. **67:** 26–61, '55

Carter, P. B.: Australian legal educa-

tion: miscellaneous comments. Res Judicatae **7:** 172–80, '55

Chroust, Anton-Hermann: Legal education in ancient Rome. J. Legal Educ. **7:** 509–29, '55

Dainow, Joseph: Foreign exchanges of law teachers. J. Legal Educ. **8:** 192–94, '55

Dainow, Joseph: Revision of legal education in France: A four-year law program. J. Legal Educ. **7:** 495–508, '55

Johnson, E. L.: Some aspects of legal education in the U.S.S.R. J. Soc'y Publ. Teacher L N.S. **3:** 25–31, '55

Nattier, F. E. Jr.: Teaching comparative commercial law. Am. J. Comp. L. **4:** 401–19, '55

Price, T. W.: South Africa. (Symposium on legal education). J. Soc'y Pub. Teachers of L. **3:** 78–82, '55

Re, E. D.: Law school training for international leadership. N. Y. S. B. Bull. **27:** 118–23, '55

Schmitthoff, C. M.: A summer course for lawyers from abroad. J. Legal Educ. **7:** 573–78, '55

Smith, T. B.: Scotland (Symposium on legal education) J. Soc'y of Pub. Teachers of L. **3:** 82–87, '55

Symposium on legal education (Canada, England and Wales, South Africa, Scotland). J. Soc'y of Pub. Teachers L. **3:** 74–87, '55

Tunc, André: New developments in legal education in France. Am. J. Comp. L. **4:** 419–25, '55

Walker, D. M.: Developments in legal education in Scotland. J. Soc'y Publ. Teachers L N. S. **3:** 9–15, '55

5. CODIFICATION OF LAW

Books:

Articles:

Fabre-Surveyer, Edouard: The future of codification with regard to the execution of wills. Tulane L. Rev. **29:** 210–22, '55

Hazard, J. N.: The future of codification in the U. S. S. R. Tulane L. Rev. **29:** 239–48, '55

Houin, Roger: Reform of the French civil code and the code of commerce. Am. J. Comp. L. **4:** 485–505, '55

Nadelmann, K. H.: Unification of private law. Tulane L. Rev. **29:** 328–50, '55

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Domke, Martin: The United Nations draft convention on restrictive business practices. Int'l. and Comp. L. Q. **4:** 129–40, '55

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Merry, H. J.: The European Coal and Steel Community-operations of the

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Prieur, Raymond: The concept of the concentration of enterprises within the meaning of Article 66 of the treaty constituting the European Coal and Steel Community. J. du Droit Int'l. **82:** 807–43, '55

Riphagen, W.: The case law of the European Coal and Steel Community Court of justice. Nedrl. Tijdsch. v. Int. R. **2:** 384–408, '55

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II. GENERAL PART

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Gray, Sir John: Islamic law in Africa by J. N. D. Anderson. (A review). J. of Afr. Admin. **7:** 33–36, '55

Grzybowski, Kazimierz: Public policy and Soviet law in the west after World War II. Am. J. Comp. L. **4:** 365–87, '55

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